

COPYRIGHT COLLECTING SOCIETIES AND THEIR INTERACTION WITH HIGHER EDUCATION INSTITUTIONS

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ABSTRACT

This thesis examines copyright collecting societies and their interaction with Higher Education Institutions. Copyright collecting societies, such as the Copyright Licensing Agency (CLA), which will be considered in the thesis, are agencies which act on behalf of copyright owners, negotiate licences and distribute royalties to them. Higher Education Institutions (HEIs) on the other hand include universities and other institutions such as colleges and vocational institutions which award academic degrees including diplomas. The present thesis will focus solely on the university sector of HEIs in the UK. It must be emphasised at the outset that the reason for electing to examine HEIs alongside collecting societies was for the following reasons. Firstly, HEIs are both creators and users of copyright works. Therefore a consideration of such an institution permits an analysis of both authors and users of copyright and hence, their relationship with copyright collecting societies. Secondly, plenty of attention has been lavished on the music industry, artists and the collecting societies such as the Performing Rights Society (PRS) associated with the music industry. As such it is the aim of this thesis to explore a relatively unexplored area drawn from the literary field, such as HEIs.

In exploring the two broad subject areas of HEIs and copyright collecting societies, a large variety of issues can be isolated for specific consideration. For this purpose and for the purpose of the main arguments, the thesis attempts to answer the following questions: are academic authors appropriately remunerated through the system of collecting societies; are collecting societies the correct medium to negotiate licences and distribute royalties on behalf of copyright owners; and are copyright collecting societies rapidly moving along the information age towards an imminent death? The answers to these questions stem from the notion that the 'incentive' for authors to write can be both economical and personal, the latter being especially true and equally important in the case of the academic author who seeks reputation, recognition and remuneration over and above financial remuneration.

This thesis explores the concept of 'remuneration' from the point of view of the CLA and the academic author. Whilst the CLA exists to remunerate academic authors, amongst others, a case study into it is carried out to seek answers to the above questions. The thesis establishes that the academic author is not fairly remunerated through the system of collective licensing and therefore considers solutions and recommendations for the future. In this context, the

thesis concludes that since the present system of remuneration through the system of collective licensing does not operate smoothly as established by the case study in to the CLA, a support system based on the Higher Education Resources on Demand (HERON) model may be the way forward for the academic author.

PREFACE

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The thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration. This thesis, including footnotes, does not exceed the permitted length.

Dinusha Mendis
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INTRODUCTION

George Bernard Shaw wrote – ‘when a stupid man is doing something he is ashamed of, he always declares that it is his duty’¹. Years earlier La Rochefoucauld noted, ‘hypocrisy is the homage vice pays to virtue’. But whether stupid or wise, men are not just hypocritical; they are often honestly unsure where their duty lies. This is one of the main reasons for the creation of rules and exceptions to these rules. This thesis looks at the law of copyright, exceptions to copyright, which apply to Higher Education Institutions (hereinafter HEIs) and the position of the academic author in relation to the reward or incentive system. As such, the thesis further considers whether academic authors within HEIs are fairly remunerated for their academic contributions by the system of copyright collecting societies; and if not, whether alternative models exist to remunerate the academic author fairly.

HEIs include universities and other institutions such as colleges² and vocational institutions, which award academic degrees including diplomas. The thesis will focus solely on the university sector of HEIs in the UK. In exploring the two broad subject areas of HEIs and Copyright Collecting Societies, a large variety of issues can be isolated for specific consideration. For this purpose and for the purpose of the main arguments of the thesis, it is written in eight chapters, in attempting to answer the following questions: are academic authors appropriately remunerated through the system of collecting societies; are collecting societies the correct medium to negotiate licences and distribute royalties on behalf of copyright owners; and are copyright collecting societies slowly moving along the information age towards an imminent death? It must be emphasised at the outset that the reason for electing to examine HEIs alongside collecting societies was as follows. Firstly, HEIs are both creators and users of copyright works. Therefore a consideration of such an institution permits an analysis of both authors and users of copyright and hence, their relationship with copyright collecting societies. Secondly, plenty of attention has been lavished on the music industry, artists and the collecting societies such as the Performing Rights Society associated with the music industry. As such it is the aim of this thesis to explore a relatively unexplored area of the interaction between collecting societies such as

¹ *Caesar and Cleopatra* (1946).

² Community colleges provide post-secondary education and lower-level tertiary education granting certificates, diplomas and associate’s degrees.

the Copyright Licensing Agency, which act on behalf of authors, artists and publishers, and their relationship with HEIs.

By way of introduction, an outline of the development of copyright collecting societies is set out.

Copyright collecting societies – the story so far...

Copyright collecting societies are agencies, which act on behalf of copyright owners, negotiate licences and distribute royalties to them. The aim and function of a collecting society is to provide

a simple method of gaining authorisation to copy removing the need to seek permission on an individual basis each time. This system allows organisations and institutions to fulfil their information requirements whilst at the same time protecting copyright and encouraging creativity³.

From the viewpoint of the right holder, it is to do for members of collecting societies, what they cannot practically and economically do for themselves, so that right holders can enforce and administer certain of their copyrights effectively and cheaply. On the other hand, as far as users are concerned, it is to provide a service to users by facilitating access to copyright works and making it possible for users to comply with their obligations under the law to obtain licences for the use of copyright works⁴. Therefore, the principal role of collecting societies is to accept mandates from their members to exploit copyrights, grant licences on their behalf to agreed pre-determined limits and, as a subsidiary purpose, to act on behalf of their members. Collecting societies all have the same principal role⁵ - 'to licence the use of the copyrights they manage; to monitor that use in order to enforce the conditions upon which the licence has been granted; and to collect and distribute the royalties payable as the result of licensed use'⁶.

Thus, collecting societies make the copyright system more effective and efficient, promote the dissemination of works and tend to enlarge the choice of works made

³ The Copyright Licensing Agency, *Who we are, What we do, Why we matter* (May 2003) at http://www.cla.co.uk/what_is_CLA/whatis.pdf (last accessed 8 June 2006).

⁴ Copinger & Skone James on *Copyright* (London: Sweet & Maxwell; 1998) at 28-04.

⁵ See also, Fry Robin Copyright Infringement and Collective Enforcement [2002] *EIPR* pp. 516-524.

⁶ *Op. Cit.*, Copinger & Skone James n. 4 at 28-04.1

available to the public. They benefit rights owners and users alike and in principle operate for the benefit of the public⁷.

The Monopolies and Mergers Commission (now the Competition Commission) suggested in 1988 that the collective licensing scheme should provide a mechanism so that payment of the required royalty meets the needs of owners and users whatever the scale of their business. In the same report where this suggestion was made, the Commission concluded that collective licensing bodies are the best available mechanism for licensing copyright works provided they could be restrained from using their monopoly unfairly⁸.

A right holder's journey through a transitory period: From 'use-for-all'... to 'protection-from-all'

The historical reasons for creating collecting societies stem from the music industry. Therefore, although this thesis focuses on literary works, for the purpose of tracing the development of collecting societies, there will be a temporary shift in focus to the music industry where due to music piracy, the first-ever collecting society came into being. During the 15th, 16th and 17th centuries in particular, composers attempted to reach out to the public with their compositions, rather than attempting to protect their music. However, as technology advanced, composers found that they had to protect their work from increasing piracy, and 'use-for-all' became 'protection-from-all'.

The diseases of the stage are public diseases. Opera is music definitely addressed to the public . . . The apostles of the new dramatic music whether they realised it or not were in fact appealing to a new public. That public had incalculable tastes and the future was in their hands. The first public-opera house was built in Venice in 1637. The audience did not altogether pay the piper. Opera is far too expensive a spectacle to survive by public support alone. There has always been private munificence behind it. But it is inherently a public art and though the public only pays partially it certainly calls the tune⁹ ... Fashionable operatic audiences used to pay hardly more attention to the stage than is now paid to the horses at a race-

⁷ *Ibid.*, at 28-06

⁸ A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings, (London: Her Majesty's Stationery Office; 1988) Cmnd. 530, para. 7.12.

⁹ Dyson George, *The Progress of Music* (London, New York, Toronto: Oxford University Press; 1938), p. 110.

meeting. They looked for the favourite and applauded. They listened for a few minutes and then returned to gossip and cards¹⁰.

In a broadcasting studio performers are spared the nervous repetitions of the gramophone session, but they may be conscious of a million listeners, some keen but ignorant, some mildly interested, some expert in the particular programme, and a very large residue for whom music is a social habit rather than an artistic recreation. No echo of this public mind reaches the performer as he works. There is nothing to tell him what are the reactions of his hearers. There is cold silence before he begins. There is even colder silence when he ends. The red light goes, that is all ... music had become, for large sections of the public, an accepted custom rather than an aesthetic experience ... music is provided as a kind of social amenity, like central heating and electric light. It is the aural counterpart of cheerful decoration¹¹.

These two quotations from the same author, referring to different periods in time, give an insight into the transition in music, the composer and listener (the public). The former quotation about the 17th century reveals the enjoyable interaction between the composer and the public and the manner in which the composer desperately wanted the public to hear his music; to the extent that it did not matter whether the public paid for this enjoyment or not. The most important thing was to ensure that the public heard the musical compositions and in turn all that was asked for was appreciation, in the form of partial payment.

In contrast, the second quotation is taken from the 20th century and reflects that the need to entice the public to actually gather in one place and listen had disappeared. Technology, through the medium of broadcasting had paved the way to reach out to the public in millions and music was accessible anywhere and everywhere. A listener was able to hear a body of classics without leaving the hearth in his or her home, which was not even a remote possibility before the development of the radio or the introduction of broadcasting. There was no desperate need for the composer to reach out to the public as before – the operatic public had generated in to a public that listened to music in millions.

The situation was heightened when in 1847, French composer Ernest Bourget visited the Paris café *Ambassadeurs* where among other pieces, an orchestra was playing his music without his permission. His response was to refuse to settle the bill for his drink of sugared

¹⁰ *Ibid.*, at p. 112.

¹¹ *Ibid.*, at p. 210.

water; his reason 'you consume my music, I consume your wares' – an argument he won before the Tribunal de Commerce de la Seine, which upheld a revolutionary law of 1793, recognizing a private right to regulate public performance for the first time¹². Bourget realised that unlike composers such as Mozart, Bach and Handel, who collected subscriptions outside concert halls or public gardens for the enjoyment of their music, this individualistic approach had become impossible with both musical and technological advancements. In other words, music was being played everywhere and composers had no control over it.

Although Bourget won his case before the Tribunal de Commerce de la Seine and supposedly received exemplary damages, the issue was not dealt with altogether. This was because the Court's ruling meant that copyright owners had to identify the use of their works and secure payments from thousands of cafes, theatres and other venues – an impossible task for an individual composer to carry out. It was in order to combat this problem faced by composers that the French *Agence Centrale pour la Perception Droits Auteurs et Compositeurs de Musique* was set up in 1850. It was recognised that collective administration spreads the cost of administration (for example, establishment and maintenance of repertoires, exemplary litigation, employment of advocates) over all members of the society. It reduces the cost to consumers, with users paying a single fee for access to the whole of a society's repertoire, thereby eliminating high transaction costs that would be incurred through clearing rights with every individual author, publisher, composer, lyricist, artist, performer and record company.

By 'pooling' their pecuniary rights in a jointly administered corporation, the authors could now effectively impose their conditions of use upon the producers, even more so after securing the support of the legislature... But the authors had to pay a price for the spectacular successes of the societies. Efficiency demanded that the authors unconditionally surrender their pecuniary rights, thereby enabling the societies to offer blanket licenses to their clients (broadcasters, cable operators, restaurants, etc.)¹³.

¹² Kretschmer M., Copyright societies do not administer individual property rights: the incoherence of institutional traditions in Germany and UK in Towse R., *Copyright in the Cultural Industries* (Cheltenham UK, Massachusetts USA; Edward Elgar Publishing: 2002) pp. 140-164.

¹³ Hugenholtz P.B., A Free Information Ecology in a Digital Environment (Conference Paper, New York University, School of Law) 31 March – 02 April 2000 at <http://www.ivir.nl/publications/hugenholtz/PBH-Ecology.doc> p. 8 (last accessed 8 June 2006).

Assisted by his colleagues Victor Parizot, Paul Henrion and also publisher Jules Colombier, *Agence Centrale* was created for the joint administration of performing rights in musical works and laid the foundations to the very first modern collecting society in 1851 – *Société des Auteurs et Compositeurs et Editeurs de Musique* (hereinafter SACEM). SACEM became the European model for collecting administration in the years to come. SACEM replaced *Société des gens de lettres* (Society of French Writers), founded by Honore de Balzac and Victor Hugo in 1838.

Unravelling the story of collecting societies in the UK and Europe

In 1905, the British Music Publishers Association (MPA) claimed that they would not accept any more music for publication until the law afforded more adequate protection. The argument was simply that composers needed to be remunerated fairly in return for providing their music. Without protection, and with reproduction made easier with technological advancements, composers were lacking in incentive to create and publishers were suffering economic losses.

Ultimately, lobbying by the publishers resulted in the Imperial Copyright Act 1911¹⁴, which was instrumental in the creation of the Mechanical Copyright Licences Company Limited (MECOLICO). MECOLICO was established in 1911 to collect and distribute royalties from producers of sound recordings for recording rights in music and lyrics – a task that could not have been carried out by individual right holders. Today, MECOLICO is no more – but in its place are the Mechanical Copyright Protection Society (MCPS) and the Performing Rights Society (PRS), both of which were created in 1914. PRS was created to administer public performance rights of authors, composers and music publishers in musical works.

Further, section 19 of the Imperial Copyright Act 1911 required right holders, if they had granted a licence to record a work, to grant a licence to any other person to record the same work upon payment of a statutory royalty. In other words, once a right holder licensed his works, it was available for all for the payment of a royalty. In 1914, the level of the statutory royalty was set at a mere 5% of the ordinary retail price of the record. It was after 14 years, in 1928, that the statutory royalty was raised to 6¼ %. The Mechanical Copyright Protection Society Ltd (MCPS), a publishers' agency, administered mechanical licences from 1924. No fixed formula was set for the distribution of royalties at that time. The system has developed

¹⁴ For a discussion on the Imperial Copyright Act 1911, see chapter 2.

vastly since then and today a 60:40 split of mechanical royalties with the publisher in favour of the composer is seen as standard.

Other major developments came about in 1934 with Phonographic Performance Limited (PPL)¹⁵ and since then more than a dozen collecting societies have been set up in the UK¹⁶ and more recent legislation such as the Copyright, Designs and Patents Act 1988 has regulated collecting societies and offered more guidance in this area.

In the European Union (EU), an EU Green Paper in 1995¹⁷ included a chapter with regard to the acquisition and management of copyright collective rights and technical systems of identification and protection, having regard particularly to new multimedia works and exploitation of works on digital networks. A follow-up paper was issued in 1996¹⁸, which identified the issue at hand and stated –

The Commission will continue to study the issue of management of rights with particular regard to the way the market evolves in response to the Information Society. The need for a comprehensive and coherent initiative at Community level which fully takes in to account Single Market and competition aspects will be considered.

The above statement reveals that intervention by the EU came towards the end of the 20th century, to ensure that collecting societies and the competitive markets that it created, responded appropriately to the information society. The aims of the Green Paper 1996 were to address the issue of the rights of the copyright holders and the members of collecting

¹⁵ See <http://www.ppluk.com> (last accessed 8 June 2006).

¹⁶ These include, Authors' Licensing and Collecting Society Limited (ALCS) which administers "secondary" rights in literary, dramatic, musical and artistic works; British Equity Collecting Society Limited (BECS) which administers performers' remuneration; Compact Collections Limited (CCL) which collects royalties for film and television producers; Design and Artists Copyright Society Limited (DACS) which administers rights in artistic works; Directors and Producers Rights Society Limited (DPRS) which administers certain rights on behalf of films and television directors and producers; the Performing Artists Media Rights Association Limited (PAMRA) which collects recorded performance remuneration on behalf of performers; the Video Performance Limited (VPL) which administers the rights of producers of music videos; Music Publishers Association (MPA); British Phonographic Industry (BPI) and the International Federation of the Phonographic Industry (IFPI). For an account on these societies, see *Copinger & Skone James on Copyright* (London: Sweet & Maxwell; 1998), 28-10. *Monopolies and Mergers Commission, Collective Licensing – A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings CM 530* (London: Her Majesty's Stationery Office; 1988).

¹⁷ COM (95) 382 final.

¹⁸ COM (96) 568 final.

societies on the one hand whilst making recommendations to regulate the monopoly power of these collecting societies on the other.

The follow-up Green Paper issued in 1996¹⁹, which identified the structure and management of rights, stated –

The usefulness of collective management, where appropriate, is not called into question, either now or in the future. A number of parties, however, call for harmonised measures to adequately control the behaviour of collecting societies, both in terms of licensing and competition rules. Some ask specifically for a clarification of the application of Community competition rules to collecting societies and collective management, possibly through a code of conduct or voluntary guidelines²⁰.

From January 2004 the European Commission together with the European Parliament has taken firm steps to consider the importance and future of copyright collecting societies²¹, which will be discussed in chapter five of the thesis.

Methodology

In attempting to answer the question whether the academic author is fairly remunerated, the thesis explores the Higher Education sector and copyright collecting societies separately and the issues surrounding them with the focus always firmly grounded on copyright law before moving on to the case study into the Copyright Licensing Agency and alternative solutions and models in the digital era.

Whilst the story of the academic author and the 'due' owed to him revolves very much around collecting societies and remuneration, it also touches on important areas such as the relationship between the publisher and author. Chapter one considers the historical relationship between the author and publisher/printer whilst chapter seven discusses the role of the publisher in the digital age. Views from John Thompson's book, *Books in the Digital Age* are discussed in establishing the powerful role played by the publisher in the creation of literary works and their commercial viability in the digital age.

¹⁹ The follow-up Green Paper was titled *Follow-up to the Green Paper on Copyright and Related Rights in the Information Society* COM(96) 568 final.

²⁰ *Ibid.*, at p. 26.

²¹ *European Parliament Report on a Community framework for collecting societies for authors' rights* (2002/2274 (INI)), Final A5-0478/2003, 11 December 2003. For further commentary, see also, EP in favour of collecting societies and levies at <http://www2.europarl.eu.int/> (last accessed 8 June 2006).

However, in recent years, attention has also turned to the nature of the relationship between copyright and authors and in this context, authors such as Mark Rose, Benjamin Kaplan, Harry Ransom, Raymond Irwin offer their differing views, which is discussed in chapter one. Joseph Loewenstein purports in his recent book, *The Author's Due*, that the history of intellectual property is distinct from intellectual property law. This view is taken up in chapter three of the thesis which confirms that this is particularly true of academic authors who appear to be more concerned about the 'intellectual' element of intellectual property than the 'property' element. This is because they are more concerned about the moral rights over their work (i.e. paying due attribution when quoting from their work) than the economic remuneration through the system of royalties²². Economic remuneration for academic authors is brought about by promotion, reputation and recognition in their respective academic fields. However, as a well-established agency, in the form of the Copyright Licensing Agency, exists to remunerate academic authors through the mechanism of royalties, the thesis considers in detail, the reasons for the breakdown in this function. Prior to carrying out a case study into the Copyright Licensing Agency, the thesis explores 'who' rightfully owns the copyright in academic articles – is it the employee author, the employer academic institution, the publisher or in certain cases, the funder? As such, the thesis examines the various reasons for the lack of economic remuneration for the academic authors. In the present context, the discussion also entails questioning the concept of copyright collecting societies and considering whether it is the appropriate medium to remunerate authors amidst its many advantages. Finally, the thesis explores alternative models and solutions in seeking a better system for academic authors and HEIs.

At the outset, it is also important to distinguish between the roles played by teaching and research within Higher Education with regard to HEIs and also in relation to the Copyright Licensing Agency. In relation to HEIs, the thesis considers the two central pillars of Higher Education – teaching and research – in chapter three although the focus will be on research and the issue of copyright in research material. With regard to the Copyright Licensing Agency, its function includes the collection of licence fees for the use and reproduction of

²² Royalty is a fixed sum. It can be paid in a lump sum or over a period of time in accordance with an agreed-on payment schedule. Once agreed upon, the sum is independent of the future success of the licensee. So even though sales may drop or rise, the royalty remains fixed at the agreed sum. This does not mean that the royalty is not affected at all by future sales; it is the contrary. One of the main tasks of the licensor and licensee is trying to anticipate future sales before the licence is made. This leads to the conclusion that paid-up licences are best suited to those situations where future sales are relatively predictable.

academic works in the course of teaching as well as remunerating authors for their research publications. Furthermore, teaching and research go hand-in-hand and therefore, although the Copyright Licensing Agency may have been created with the teaching function and Course Packs in mind, it has to be re-iterated that their function extends to remunerating the research author. Therefore, although this thesis does not particularly distinguish between teaching and research when discussing issues pertaining to the Copyright Licensing Agency, it is important to understand that as far as remunerating the author is concerned, it is mainly the collection and distribution of licence income in relation to the research function of the Copyright Licensing Agency, which is being referred to. However, it must be pointed out that the case of *UUK v. CLA*²³ discussed in chapter six of the thesis revolves around the collection of licence fees in the course of teaching. As such, and as already noted the thesis touches upon the issues relating to the functions of teaching and research, although from the point of view of the main question raised in the thesis, research plays a bigger role.

A further underlying area of discussion is the relationship between copyright law and economics. There have been many attempts to locate the balance of copyright law alongside the administration of copyright. One important player in the balancing act has been economics. As far back as the 18th century, Adam Smith confirmed that copyright was distinct from other types of monopolies and was harmless²⁴. In the latter years of the 19th century, Henry Sidgwick took a middle path and explained that although copyright may be a harmless monopoly it can be costly when measured in terms of the criterion of consumer wealth, which will be discussed in chapter five of the thesis²⁵. During the 20th century, Arnold Plant was the first economist to have applied economics to copyright in 1934, when he published his article, 'The Economic Aspects of Copyright in Books'²⁶. Stephen Breyer, William M. Landes and Richard A. Posner also wrote seminal articles during the mid-20th century. Landes and Posner, in particular, argued that the balance of copyright lies between the costs of limiting access to a work and the benefits of providing incentives to create in the first place. As such, Landes and Posner consolidated the theories of Adam Smith, Lord

²³ Case Nos: CT 71/00, 72/00, 73/00, 74/00, 75/01, in the Copyright Tribunal, [2002] R.P.C. (36), 693.

²⁴ Smith A., *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 2 (Oxford: Clarendon Press; 1976), p. 754; Smith A., *Lectures on Jurisprudence* (Oxford: Clarendon Press; 1976) Report 1762-3, ii 31-34, pp. 82-83.

²⁵ Sidgwick H., *Principles of Political Economy* (3rd ed.) (London: Macmillan & Co. Ltd; 1901) chapter 10.

²⁶ (1934) (1) May, *Economica* (new series) 167-195.

Macaulay, Arnold Plant, Novos and Waldman, and rather than brand copyright law as a harmless monopoly or an economic necessity, they showed that it can have both economic benefits and costs.

This is especially true from the standpoint of copyright collecting societies. Whilst collecting societies perform an important function for the benefit of both right holders and users alike, the system is also burdened with necessary costs – such as being a legal monopoly, which has given way to an abuse of their monopoly position. The thesis discusses the monopoly aspects of copyright law and collecting societies in order to determine the drawbacks and to deliberate whether competing collectives can be a solution for HEIs, which have felt the effects of a breach of monopoly by the Copyright Licensing Agency in 2001. A further aspect, which the reader must bear in mind in the balancing act, is the reward system as discussed by Jeremy Bentham in the years before 1900 and by Landes and Posner in the 20th century. The economics of the reward system is of particular relevance to the present thesis and to the question of ‘are academic authors fairly remunerated through collecting societies?’ Whether the reward is in the form of royalties or in the form of promotion and reputation, the important fact is that it provides the incentive for the author to write which is the economic foundation upon which copyright law is built and portrays the reason behind its existence for nearly three hundred years.

Thesis and outline

Chapter one is an introductory chapter and is titled ‘An Introduction to the Historical Development of Copyright and Exceptions to Copyright Law’. Chapter one takes the reader through the historical development of exceptions to rules, in particular the defence to copyright law in the light of technological advancements up until the 20th century. The defence of fair dealing, which assists in the research and private study within HEIs did not always exist in British copyright law – in fact, it only came into existence in 1911 through the Imperial Copyright Act of that year. The chapter takes the reader through a historical journey and gives an insight into the shaping of copyright laws and considers the exceptions to copyright laws in the pre-statute era. Before statutory law introduced copyright exceptions, it was dealt with by the common law, under the defence of public interest. Public interest is a defence outside and independent of statutes, is not limited to copyright cases and is based upon a general principle of common law. The debate on public interest questioned whether there should be a perpetual right to copyright law or whether it should be limited to a particular duration of time as laid down by the Statute of Anne 1709. This debate continued throughout the 19th century and into the early years of the 20th century, until

the Imperial Copyright Act 1911 was brought into existence which implemented the Berne Convention for the Protection of Literary and Artistic Works 1886. Therefore, chapter one traces the development of copyright law up until 1886 and in considering the debate on literary property questions the position of the author in an era where power vested with the printers.

Chapter two is titled 'The Shaping of Modern Copyright Law and its Application to Higher Education Institutions'. This chapter embarks on the first of the two main themes of the thesis: HEIs. The reason for writing this chapter is to draw attention to the changing nature of the exceptions to copyright law from the common law defence of public interest to the statutory defence of fair dealing in 1911 and its modification during the 20th century to deal with the reproduction of multiple copies of copyright works. This is because fair dealing applies to reproduction of a single copy and not multiple copies. Before the photocopy machine was invented, the defence of fair dealing was not challenged, but with its invention during the mid 20th century making of multiple copies became very convenient. This brought in to question the position of HEIs in their use of the fair dealing exception whilst permitting students and staff the access and ability to make multiple copies. Chapter two therefore assesses the position of the law in relation to HEIs where the reproduction of copyright works surpasses the scope of the fair dealing provision.

As such, the main aim of the chapter will be to examine the intrinsic link between copyright law, technology and HEIs. In this context, chapter two considers the development of modern copyright law and its challenges throughout the 20th and 21st centuries as a result of technological developments and the manner in which it was applied to HEIs – thereby keeping the focus on the development of copyright law from 1886 to the present day within the context of HEIs. In considering the development of copyright laws and its application to HEIs, chapter two also deliberates the relationship between the law, HEIs and the founding of copyright collecting societies.

Chapter three is titled 'Higher Education Institutions: Development and Effect on Copyright Law' assesses the impact of the development of HEIs on copyright law. In this regard chapter three considers the reverse argument, to that which will be raised and addressed in chapter two. Chapter three considers the effect of the development of HEIs on copyright law i.e. the chapter examines the way in which the increase in the number of universities during

the 1960s coupled together with the increase in the number of students having access to copying devices such as the photocopy machine, had an impact on copyright law.

This chapter which is written in two parts will first, consider the development and functions of HEIs throughout the 19th and 20th centuries before turning to consider the question of copyright ownership within UK HEIs. HEIs are responsible for both the use and creation of copyright material. In considering the ‘ownership’ question, chapter three will focus on copyright ownership of teaching and research material and in particular whether academic authors as employees of HEIs have a right of ownership to the copyright in their research. Are they aware of their right to copyright? Do they assign their copyright to the publishers in exchange for the publication as a matter of practice? These are some of the questions, which are addressed in this chapter. It is important to answer these questions, which are directly relevant to the key question of the thesis: are academic authors fairly remunerated for their academic contributions? The reason being that it is important to identify the different players involved, in relation to research and academic writing, and to address the question of ownership in copyright before moving on to specifically question whether the academic author is properly remunerated.

Chapter four which is titled ‘Around the World in Thirty Years (1975-2004): Case Studies from Australia, the UK and Canada’ examines three cases. The Australian case of *Frank Moorhouse v. University of New Wales*²⁷ highlights the pressures faced by HEIs in attempting to keep up with the law in the face of technological developments such as the photocopying machine during the 1970s. The case of *Moorhouse* illustrates that where the reproduction of copyright works, is carried out within an institution such as HEIs where there is a lack of clear and precise guidelines as to how much and what can be reproduced, such copying will be considered to have gone beyond the limits of the exception of fair dealing. In such a situation, it is not the individual who will be held liable for the infringement of copyright but the institution, which ‘invited’ the individual to ‘copy’ without clear guidelines as to what and how much he or she can photocopy. The case set a precedent for the rest of the world and shortly after the case was decided in the Supreme Court of New South Wales of Australia, the UK learnt lessons from it.

²⁷ (1975) 133 C.L.R. 1.

Just over a decade after the *Moorhouse* case, the British case of *C.B.S. Songs Ltd. & Others v. Amstrad Consumer Electronics Plc and Anor*²⁸ also examined the issue of ‘invitation to copy’ or ‘authorise’ to copy. Although this case arose in the music industry, the main question remained the same: whether Amstrad had ‘authorised’ the breach of copyright by selling double-speed twin-tape recording equipment. These two cases questioned whether technological equipment facilitates and authorises reproduction of copyright works, which ultimately leads to a breach of copyright, with authors (or artists in the present case) losing out on remuneration in the process. In the late 1990s the issue of technological equipment as a medium for copyright infringement raised its head again – in Canada – in the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*²⁹. Although the issue arose in 1999, the case was finally resolved in 2004. Chapter four discusses these cases in detail, analyses them and sets out their relevance to the thesis.

Chapter five is titled ‘Copyright Collecting Societies: An Economic Insight and their Significance in the Digital Age’, and examines the second main theme of this thesis. This chapter considers two distinctive characteristics of copyright collecting societies – reduced transaction costs, which is one of the main reasons for their creation, and secondly, the monopoly aspect of copyright administration relating to transaction costs. Chapter five commences by looking at ordinary monopolies vs. copyright monopolies from the vantage point of economists such as Adam Smith, Jeremy Bentham and Lord Macaulay. The reason for going back in time to consider the views of Adam Smith and Bentham, in particular, is to portray that before 1900, copyright monopolies were considered as ‘harmless’ as opposed to ordinary monopolies, which were considered harmful. By the 20th century, economists such as Sir Arnold Plant, Novos and Waldman, Johnson, Landes and Posner recognised the drawbacks of the theories of Smith and Bentham. Landes and Posner in particular illustrated copyright law as an economic good with necessary costs. As such they moved away from the idea that to have a monopoly in copyright and as such, in copyright collecting societies, is harmless.

Reducing transaction costs by collectively negotiating licences is one of the more attractive features of collecting societies. However, the monopoly aspect surrounding transaction costs is a drawback of copyright collecting societies. In 2001 a breach of the monopoly position by the Copyright Licensing Agency (CLA) led HEIs to bring a case against them, which was

²⁸ [1988] R.P.C. 567.

²⁹ (2004) SCC 13.

ultimately won by HEIs³⁰. Therefore, with the monopoly aspect of copyright collecting societies being a main drawback, this chapter looks at the prospect of competing collectives as a possible solution to the issue of monopoly and will consider how they can be improved within the UK to assist institutions such as HEIs. As a final point, the chapter considers the idea of reduced transaction costs in the electronic era and questions its validity in the Internet age.

Having set out the issues arising from both HEIs and copyright collecting societies, chapter six which is written in three main parts, will bring the two strands together in part one, by initially examining how the interaction between HEIs and copyright collecting societies came about. Preceding this discussion, chapter six gives a very brief insight into the provisions, which were recommended by the Whitford Committee in relation to the setting up of collecting societies. Since chapter two will deal in detail with the recommendations of the Whitford Committee in extending collecting societies to the literary field, the introduction to chapter six in this context will be kept brief. The chapter also by way of introduction sets the scene for the two regulatory bodies in charge of Higher Education and right holders respectively: Universities UK (previously Committee of Vice-Chancellors and Principals (CVCP)) and the CLA, and assesses how the interaction between HEIs and CLA came about. Having set the background to the interaction between HEIs and CLA, chapter six aptly examines one of the most important issues, which arose from the negotiations between UUK and CLA: the case of *UUK v. CLA*.

Part two of chapter six then turns to investigate the specific workings within the CLA with an insight in to the Annual Reviews' of 1999, 2003 and 2004. The aim of carrying out this investigation is to examine whether the licence fee, which comes into CLA, is fairly distributed amongst the right holder members i.e. authors, artists and publishers? In expanding on this argument, the chapter makes use of graphs and tables to illustrate the gross fee collections and distributions during the chosen years for discussion. A number of allegations were made against the CLA, all of which will be set out and then counter-argued from the point of view of CLA, using face-to-face and telephone interviews conducted by the present writer. Thereafter, an analysis of part two is carried out – before the chapter turns to consider the survey methodology of CLA, in part three, which will look into the Higher Education Copying Accord (HECA) licences in practice, i.e. licences which have been drafted between HEIs and CLA.

³⁰ *UUK v. CLA* [2002] R.P.C. (36), 693.

Finally, chapter seven sets out recommendations and suggestions for a more effective system as far as academic authors and HEIs are concerned. In doing so, chapter seven will take an insight into the publishing industry in the higher education and academic sectors. This chapter will initially take an insight into the publishing industry and demonstrate how commercial publishers migrated into the field of higher education and academic publishing following the ‘university boom’ in the 1960s. Since then, publishers have made large profits in the process of making HEIs buy back the research (academic journals), which academic authors have produced in the first place. Over and above these profits, publishers then charge licence fees through the system of collecting societies for the use of those publications within HEIs. In this manner chapter seven demonstrates the historical trend of the ‘power to the printers’ in the run up to the digital age. Therefore, the question, which this chapter aims to answer, is whether a new model can be created with HEIs and academic authors in mind or whether the existing model of Higher Education Resources On-Demand (hereinafter HERON) which was tailored, with the HEIs in mind can be tailored to fit the present problem. The Joint Information Systems Committee (JISC) funded the HERON project in 1998 with the help of three Higher Education Institutions – University of Stirling (lead site), Napier University (Edinburgh) and South Bank University (London). HERON is a one-stop-shop and provides for copyright clearance, digitisation and delivery of book extracts and journal articles enabling universities and colleges to provide access to key learning materials for all their students, wherever they are based³¹. As such, the chapter focuses on how the system of collective management can be improved from the author’s point of view.

Finally, chapter eight draws conclusions.

³¹ For more about the initial stages of setting up HERON, see, <http://www.heron.ac.uk> (last accessed 8 June 2006).

PART A:

THE LAW AND TECHNOLOGY

**AN INTRODUCTION TO THE HISTORICAL
DEVELOPMENT OF COPYRIGHT LAW AND
COPYRIGHT EXCEPTIONS**

CHAPTER 1

AN INTRODUCTION TO THE HISTORICAL DEVELOPMENT OF COPYRIGHT LAW AND COPYRIGHT EXCEPTIONS

Introduction

Copyright has emerged as one method to cope with the issues of cultural and economic life, the social attitude towards intellectual creations and their uses, and the position of the creator in society. It is a means of organising and controlling the flow of information in society. The benefits generated by copyright can be two-fold: as an incentive to the author to write again and also as an economic reward in the form of royalties.

In relation to HEIs, the benefit enjoyed by an academic author can be identified as incentive-based – as their reward for academic writing will lead to promotion and higher salaries, prompting them to write again. It is questionable whether academic authors can also reap economic rewards through copyright. Therefore, whilst ‘remuneration’ is one of the key factors behind the copyright regime, this thesis attempts to portray that although economic remuneration through collecting societies and hence royalties may not always work for the academic author, a ‘remunerative support system’ can prove to be more successful. The fact is that authors create because there is an incentive to write generated by economic gain, whether it be in the form of royalties, promotion within a job, higher salaries or a support mechanism such as the proposal presented in chapter seven.

This chapter aims to look at the historical development of copyright and exceptions to copyright law: how did it come about? Why was copyright law historically needed? Did it always protect the author and reward them economically? What about the printer without whom the author would be unable to reach the wider audience? These questions amongst others will be explored and discussed in detail. The chapter will also consider in detail the concept of ‘public interest’. Public interest ‘is a defence outside and independent of statutes, is not limited to copyright cases and is based upon a general principle of common law’¹. In

¹ Ungood-Thomas J., *Beloff v Pressdram* [1973] 1 All ER 241 at 259. Also Davies G., *Copyright and the Public Interest* (2nd ed.,) (London: Sweet & Maxwell; 2002) at p. 63.

the development of copyright law, in the UK it is correct to state that until the twentieth century the common law right of public interest was the defence to copyright infringement. It was not until 1911 that exceptions, as a defence to copyright, appeared in a statute. The reason for this discussion is two-fold: (1) public interest was instrumental in the shaping of copyright laws, in particular the shaping of exceptions to copyright which is directly relevant to this thesis; and (2) throughout the centuries, particularly from the 17th – 20th centuries, the concept of public interest was anything but smooth sailing— by taking a convoluted path, sometimes dwindling in importance whilst at other times it has been at the heart of the law-making process. Having stated this fact, it is important to point out that public interest in itself is not a theme of this thesis and following this chapter will not be considered again.

This chapter sets the scene to the thesis, lays the foundation and identifies the path taken to arrive at the first copyright law statute in the UK and the first international copyright convention in the world. An analysis of modern copyright law is carried out in Chapter 2.

Historical development of exceptions to rules: why do we need them?

Just as people in all societies allow exceptions to many rules, in most – perhaps all – societies, people follow other rules strictly allowing no exceptions. For example, the Siriono should not, and did not, eat raw meat, even when they faced starvation. Iglulik Eskimo [sic] women with infant children were never allowed to share their cooking utensils with other women . . . None of this should be eye-opening for anthropologists, but with the decline of the normative theory, reports such as these are frequently dismissed as statements of “ideal” rules that would not be borne out by real behaviour if the matter were investigated . . . As a result, strict rules receive little attention in modern social theory; it is far more likely that the flexibility and intracultural diversity of rules will be emphasized².

As far back as 2500 years ago, organised societies based on laws or rules recognised the need for exceptions, based on people’s social rank, relationships and motivation as well as a result of the circumstances surrounding the offence, which has been committed. However, as R.B. Edgerton, states a society has not done without rules altogether, whereas societies

² Edgerton R. B., *Rules, Exceptions, and Social Order* (Berkeley, Los Angeles, London: University of California Press; 1985), pp. 15-16.

have been reluctant to introduce exceptions to rules for many reasons³. Bearing this in mind, the central question that can be asked is – why have exceptions to rules become almost a necessity? To quote Edgerton once again –

If rules are so important for the creation and maintenance of social order, then why allow exceptions to them? Why not state these rules explicitly and unambiguously, follow them, and penalize anyone who fails to do so? If the answer to the first question – whether rules are indeed vital for social order – is pursued in a global way, it can become the epistemological equivalent of gardening in a nuclear-waste dump. Only if we keep in mind that there are different kinds of rules and that some rules help to solve problems for people while others create problems – at least for some people – can we avoid the hazards of global assertions about the role of rules in human affairs⁴.

As such, four general categories of exceptions to rules that lead to reduced responsibility have been identified in most of the world's societies. They are –

- (1) exceptions based on temporary conditions, such as intoxication, spirit possession, illness or strong emotions⁵;
- (2) specific statuses that carry with them longer-lasting exceptions from certain kinds of responsibilities; statuses providing such exceptions commonly include infancy, old age, political authority and chronic mental illness⁶;
- (3) exceptions relating to special occasions, such as harvest or initiation rituals and funerals⁷; and

³ *Ibid.*, at p. 255.

⁴ *Ibid.*

⁵ For example, homicide committed while one is enraged or in fear for one's life is a defence to murder, namely self-defence. Homicide need not be excused or even punished less severely, but when a society denies exemption on the basis of strong emotion, it does so despite the presence of a condition that makes ordinary rule-governed propriety problematic and creates the possibility that there should be legitimate exceptions to rules for people who are temporarily affected by one of these conditions – *see op. cit.*, Edgerton n. 2 at p. 208.

⁶ If physically impaired people are to remain members of society, some exceptions to the rules may have to be allowed and age be taken into account – especially children and the elderly.

⁷ Donald Tuzin relates an example from Papua New Guinea of the guilt and confusion that Ilahita Arapesh men felt when ritual occasions obliged them to be cruel and sadistic to their wives and children. As Tuzin describes, these men loved their wives and children, yet, during certain ceremonies, these same men were required to follow rules that forced them to carry out acts of ritual cruelty against women and children. *See*, Tuzin D.F., "Ritual Violence among the Ilahita Arapesh: The Dynamics of Moral and Religious Uncertainty" in Herdt G.H., (ed.), *Rituals of Manhood: Male*

- (4) exceptions that apply only in certain settings, such as sanctuaries, men's houses or bar rooms.

So what if a society has rules without any exceptions? Such a society will experience inequality (as it is usually the powerful who impose strict rules on others) and a lack of co-operation from members of that society to abide by such strict laws where there is no reduced rule-regulation where "release" or "relaxation" is possible.

Therefore, just as much as rules are significant and important for the creation and existence of organised societies, so are exceptions to these rules – to ensure the smooth running of a society. Rules, and rules about exceptions to rules, can never control all behaviour effectively as there will always be some disruptive behaviour that is neither regulated nor capable of punishment, and as a result there will be conflict. However to bring most behaviour under the regulation of rules, including rules about exceptions to rules is a necessary step toward the creation of social order – and 'even imperfect social order is a supreme human achievement'⁸.

Shaping of copyright law and copyright exceptions: its historical development

This part of the chapter will look at the historical development of copyright in UK and the writer will draw particular attention to the development of the public interest debate and the emergence of statutory exceptions to copyright law in the UK.

Once upon a time . . . information was completely free . . .

Before the right of copyright was recognised, information was circulated amongst communities and it was believed that such information belonged to the society – not to an individual creator. 'Strikingly and significantly, early Indian history is the history of societies rather than of persons. Even the great literary and philosophical masterpieces are

Initiation in Papua New Guinea (Berkeley, Los Angeles, London: University of California Press; 1982), pp. 321-355.

⁸ *Op. cit.*, Edgerton, n. 2 chapter 12.

all anonymous. *Not who said it, but what was said* – this was what mattered⁹ (*emphasis added*).

History records that the first form of protection for intellectual literary creation took place in ancient Egypt. The recording of human communication lay at the hands of the priest or holy man who was considered to be the first to lay claim to knowledge¹⁰. If anyone other than the members of the priesthood were overheard reciting the sacred rituals, they were liable to immediate execution.¹¹ Where the rituals were recorded in a more permanent form, for example, in a manuscript, Mark Rose tells us that the owner of such a manuscript was understood to possess the right to grant permission to copy it¹². Harry Ransom re-iterates this point but also emphasises the importance of public interest in ancient Egypt. He goes on to state that in the exchange and copying of manuscripts, book property might have been controlled but ‘owners were willing to suspend their powers of control in order to encourage learning, sustain faith, and ensure their own opportunities for borrowing books’¹³.

As time passed, the individual who created literary works for the education and entertainment of society came to be recognised as the ‘originator’ of that work and the permission of this originator had to be obtained if an individual wished to copy his work. As more and more ‘authors’ came in to being obtaining permission became essential. In the 14th century, Guillaume de Guileville in his preface to *Pelerinage de la vie humaine*, states that his dream, which he recorded in 1330, ‘ought not to have travelled without his leave’¹⁴.

⁹ Oliver R., *Communication and Culture in Ancient India and China*, (Syracuse University Press; 1971) as referred to in Ploman E. W. & Hamilton L. C., *Copyright – Intellectual Property in the Information Age* (London, Boston and Henley: Routledge & Kegan Paul; 1980), p. 4.

¹⁰ Professor J.Z. Young in his Reith Lectures, *Doubt and Certainty in Science* (1951) suggests that three particular achievements marked the first appearance of human civilisation in early times. One was the gathering of men into cities, with all the social organisation that belongs to urban life. Another was the growth of the religious idea, expressed by means of holy places (grove, sacred hill, shrine, temple or church), which served to bind the urban population into a unit. *A third was the development of the art of human communication* [the art of recording communications - which distinguishes human communication more sharply from animal communication]. See, Irwin R., *The Golden Chain: A study in the history of libraries* – An Inaugural lecture delivered at University College London, 21 November 1957 (London: H.K. Lewis & Co Ltd.; 1957) at p.4.

¹¹ *Op. cit.*, Ploman & Hamilton, n. 9 at p. 6.

¹² Rose M., *Authors and Owners: The Invention of Copyright* (Cambridge Massachusetts, London England: Harvard University Press; 1993), at p. 9.

¹³ Ransom H., *The First Copyright Statute: An Essay on Act for the Encouragement of Learning 1710* (Austin: University of Texas Press; 1956), chapter 2.

¹⁴ Root R.K., *Publication Before Printing: Publications of the Modern Language Association*, XXVIII (1913), pp. 428-429 found quoted in *op. cit.*, Ransom H., at pp. 18-19.

Gutenberg's invention of the printing machine in 1436 meant that subsequently there was a proliferation of books and of printers, who at the same time functioned as bookbinders and booksellers. The founding of the press in Westminster, England in 1476 by Caxton and in Edinburgh, Scotland in 1508 by Chepman and Myllar heightened this issue¹⁵. However it is believed that in order to print Scots verse (Gaelic) printing irons would have either been imported (from France) or special ones fashioned for this purpose¹⁶, making printing in Scotland quite an intricate task.

The earliest accepted form of legal 'permission' was the printing privileges granted in 15th century Venice. "Privileges" were exclusive rights granted by the state to individuals for limited periods of time to reward them for services or to encourage them in useful activities¹⁷. This accentuates the incentive/economic reward argument set out above. Privileges were initially awarded for protecting mechanical inventions in Venice, which we would today call patents, and it seemed logical to extend this protection to books. The first and most famous privilege was a monopoly on printing itself granted in 1469 for a term of five years to John of Speyer. The first author's privilege was granted in 1486 to Marc' Antonio Sabellico, the historian of Venice. According to this privilege, Sabellico could choose *which printer* would publish his book, and any *other printer who published it would be fined 500 ducats*¹⁸ (*emphasis added*). It is important to note at this stage that the privileges favoured the printers and it was also the printers who were liable in cases of piracy. Authors as the creators of manuscripts or readers as those using and possibly dealing in these pirated manuscripts were out of the picture. Copyright law had begun to take shape and it is clear that the main team players in the copyright game consisted of both authors and printers. They needed each other to play the game effectively: the printers needed the author to create literary works to provide them with business whilst the author needed the printer to reach out to a larger audience. However, throughout the years one of the players always dominated the game: the printer. Fuelled by the technological development of the printing press, the printers found that they had the upper hand and came to the pleasant realisation that without them, authors would not survive.

¹⁵ Kaplan B., *An Unhurried View of Copyright* (New York, London: Columbia University Press; 1966) Chapter 1 - 'The First Three Hundred and Fifty Years', pp. 1-25.

¹⁶ National Library of Scotland, *Place in the History of Printing*, Digital Library at <http://www.nls.uk/digitallibrary/chepman/history.htm> (last accessed 10 August 2006).

¹⁷ *Op. cit.*, Rose M., n. 12. pp. 9-10.

¹⁸ *Ibid.*

Power to the printers: 16th Century Britain

Printing privileges, which originated in Venice spread to other European states in the 16th century. In England, the first printing privilege was granted in 1518¹⁹ but as in Venice, most of the privileges were issued to printers. A Royal Printer appeared in 1485, and from 1518 onward came a stream of royal grants of privileges and patents for exclusive printing of particular books. The first author's privilege, in the form of a seven-year patent, was awarded to the royal chaplain, John Palsgrave, in 1530, for a textbook on the French language²⁰.

The setting up of the Stationers' Company, the 'literary Constables' as Kaplan called it, created a second method of regulating the press and printing in England²¹. This method permitted the printing of a book by entry in the company register. The traditional stationers' term employed in the register was 'copy'; a word that referred both to the original manuscript and the right to make copies of it. Once again, though, only members of the guild – that is booksellers and printers, not authors – could own copies.

The advancements brought about by printing and the press had paved the way to piracy. Following the setting up of the Stationers' Company in England, Queen Elizabeth introduced the Injunction of 1559 which was directed against the publication of 'unfruitful, vain and infamous books and papers' and on 29 June 1566, seven years after the Injunction, a Council Order preserved the licensing provisions of 1559 which defined penalties for violating printing regulations²².

The third major development in this period to deal with growing piracy was the Star Chamber Decree of 23 June 1586, which ordered that all published works be licensed, by registering with the Stationers' Company²³. Its chief purposes were the suppression of both the press and printers, the concentration of the trade in London, the support of the Stationers' Company and the enforcement of the Queens' Injunctions.

¹⁹ See, Feather J., *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (London, New York: Mansell Publishing Limited; 1994), chapter 1 – 'The Origins of Copyright 1475-1640', pp. 10-36.

²⁰ *Op. cit.*, Kaplan B., n.15 Chapter 1.

²¹ Queen Mary I, by letters patent of 4 May 1557, set up the Stationers' Company – *see also, ibid.*

²² *Op. cit.*, Ransom H., n. 13 pp. 35-36.

²³ The English Star Chamber was subsequently abolished in 1641.

The developments in 16th century England reveal one important factor - the focus of the printing privileges, Stationers' Company, Injunctions and Decrees was the control of the printer and not the author. Most privileges were issued to printers and only a handful of authors such as Sabellico, Petro Francesco da Ravenna of Venice and Palsgrave of England were issued with privileges²⁴. The Stationers' Company was set up with printers in mind and the Injunctions set out the 'rights and wrongs' of the printers. Nowhere were the authors' rights mentioned nor were the authors remunerated in any way for their creative efforts. The need for protection of literary works had certainly been recognised, but not necessarily with authors in mind. Although, the privileges were aimed at protecting authors' manuscripts, the 'right' rested with the printers and accordingly the authors were at the mercy of the printers.

16th century England did not specifically focus on any defence of printing in the public interest. However, what can be implied from the above discussion is that the printers were eager to publish the authors' works and to get their name on the books. The authors themselves did not put up a fight to be identified or remunerated for their works. The main concern was that a certain printing company or printer had the 'right' to publish an author's work. The first of a number of technological advancements had come between the author and user – and for the first and last time in the history of copyright, the tug-of-war between the author and user was almost non-existent. Printers and/or booksellers committed piracy, but not users, who at the time did not have access to such developed technology, which facilitates reproduction of copyright works, as is the case now. The author was clearly overshadowed by the printers, and had no claim to rights. Therefore, what is clear from 16th century England is that all the players involved in the copyright game were important, but, without the star-player, the printer, the author's work could not have reached the wider public, leading to recognition and remuneration.

Information as the property of printers questioned – 17th Century England

17th century England saw the face of copyright change dramatically. In 1641 the book trade was thrown into chaos by the abolition of the Court of Star Chamber – the instrument of authority behind both licensing and Stationers' Company's monopoly on publishing. The Press Regulation Act of 1662 (hereinafter Printing Act 1662), which restricted printing and re-installed licensing, came to an end and through non-renewal expired in 1695²⁵. This

²⁴ *Op. cit.*, Kaplan B., n.15 chapter 1.

²⁵ For an account of the period between 1641-1662, *see op. cit.*, Ransom H., n. 13 at pp. 66-75.

meant that anything could be printed and anyone with access to a press, legal or surreptitious, could print.

Yet, it was during these years that copyright took on a different shape. On the same day that the House of Commons rejected the Printing Act 1662, they appointed a new committee, headed by Edward Clarke, to prepare and bring in a Bill for the 'Better regulating of Printing and Printing Presses'. The Bill received its first reading in the House of Commons on 7 March 1695 and by 30 March 1695 the House resolved that it should be committed²⁶. Although ultimately this Bill was rejected by the Commons and is obscured in copyright history by the introduction of the first-ever Copyright Statute shortly afterwards, it was a stepping-stone towards diverting the limelight from printers to authors.

Sections 5-8 of the Bill are particularly relevant in this context as they state that anyone who put their name to a work would be accountable as the author of the work (along with the author); no one was allowed to sell a book which did not have the name of the author printed on the work and no one was allowed to use another's name without authority.

Ss. 5-8. – And be it further Enacted That whosoever shall order his name to be printed to any matter or thing shall be answerable to the Law as if he were the Author of the same nevertheless the Author to be also answerable and punishable for any thing illegal contained therein if such author can be discovered

And be it further Enacted that noe person shall sell or publish any Book or pamphlet pourtraicture or paper hereafter printed in England whereon the printer and publishers name is not printed under the penalty of forfeiting _____ for every offence

And be it further Enacted that noe person shall print the name of any person as publisher of any book pamphlet pourtraicture or paper without authority given in writing for soe doing . . .²⁷

However, a sticking point in the Bill was that it made no attempt to protect any property in books, unlike the Printing Act 1662. Both Stationers' and independent printers objected to losing the protective features of the Printing Act 1662. Their concerns were voiced by

²⁶ For an account of the different stages of the 1695 Bill, see Deazley R., *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Britain throughout the Eighteenth Century* (1695-1775), (Oxford: Hart Publishing; 2004) pp. 11-22.

²⁷ For a copy of the Bill, see, De Beer E.S. (ed.), *The Correspondence of John Locke in Eight Volumes, Volume Five, Letters Nos. 1702-2198* (Oxford: Clarendon Press; 1979) pp. 791-795.

Clarke, who headed the committee for drafting the Bill and together with Freke wrote to John Locke complaining that, 'the Court, the Bishops and the Stationers' Company take great exceptions to it for they all agree to say that it is wanting as to the Securing of property'²⁸. Locke's reply on 18 March 1695 –

Suggested that they might secure the 'Author's property in his copy' by adding a clause either to s.8 allowing a right to reprint any work with the name of the author or publisher upon it for a limited time in years only, or to s.9 suggesting that a 'receit' be issued for the delivery of the three copies which 'receit' . . . shall vest a privilege in the Author of the said book, his executors administrators and assigns or solely reprinting and publishing the said book for _____ years from the first edition thereof²⁹.

As stated above, the House of Commons rejected the Bill but not before it had opened up two important debates – (1) whether the author was the owner of the property in books and (2) the 'impassionate debate' on 'literary property' which was to continue for many years to come. Both these debates were crucial in the making of the Statute of Anne 1709 and afterwards. Once again, even though there were no concrete exceptions in place in 17th century English statutes, two implications are apparent. First, the consequences if the author is recognised as owner of the property and secondly, consequences if the literary property lasts forever. If both are answered in the affirmative, or even partially affirmative, the defence of public interest would have been weakened considerably and in turn such high protection of literary works would inevitably have opened up the floodgates to litigation.

Whence came the Statute of Anne 1709 – 18th Century Britain

"They" – the stationers, whose property by that time "consisted of all the literature of the Kingdom; for they had contrived to get all the copies into their own hands" – "came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them a statutory security"³⁰.

Accordingly in 1709, two years after the Act of Union was signed in 1707 uniting Scotland and England as one country, the British Parliament produced the most significant breakthrough in the history of copyright law and introduced the first piece of copyright

²⁸ *Ibid.*, at p. 291, letter no. 1860.

²⁹ *Ibid.*, at pp. 795-796, Appendix no. 3.

³⁰ Lord Camden, in *op. cit.*, Kaplan B., p. 6.

legislation in the world – ‘An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors of Purchasers of such Copies, during the Times therein mentioned’ (hereinafter Statute of Anne). The Statute of Anne, which came into force on 10 April 1710³¹ provided that existing printed books would be protected for a period of 21 years and the Stationers’ Company would hold the sole right to these books. More importantly authors and assigns were to enjoy a term of protection of 14 years from the date of publication for books not yet printed. Following the expiration of 14 years, the sole right was to return to the author if living, and if not, to assignees for another 14 years³². This was perhaps one of the most significant amendments made by the House of Lords and signifies an attempt to distinguish the rights of the author from the bookseller and to promote the author’s interests³³.

The Statute is in eleven parts and although there are many provisions which focus on the rights of printers and their liability, the author, as creator, had finally been recognised and a term of protection during which time the printers and authors had right to literary property had been established, although this led to much debate based on public interest in the years to come.

Before moving on to consider the question of literary property and public interest debate surrounding the Statute of Anne, it can be queried whether the Statute of Anne ‘closed the period of experiment and tentative administration of literary property and opened the period of modern copyright law’³⁴. In other words, did the Statute of Anne completely remove the common law right of perpetual copyright, which had existed until 1710? Three bills in the first-half of the 18th century and two English cases and a Scottish case in the second-half were instrumental in searching for an answer to this question.

³¹ There has been a great deal of confusion about the date of the statute, the reason being that the legislative and legal year did not end until 24 March 1710. *See also, op. cit.*, Ransom H., n. 13 at pp. 98-99.

³² For a comprehensive overview of the history and development of copyright law from 1710-1911, see, Alexander I.J., *The Metaphysics of the Law: Drawing the Boundaries of Copyright Law 1710-1911*, Cambridge University PhD Thesis, (Unpublished). *Also see, op. cit.*, Davies G., n. 1 chapter 4.

³³ ‘Section XI. – Provided always, that after the Expiration of the said Term of fourteen Years, the sole Right of printing or disposing of Copies shall return to the Authors thereof, if they are then living, for another Term of Fourteen Years’.

³⁴ *Op. cit.*, Ransom H., n. 13 at p. 106.

The Question of Literary Property and Public Interest examined: 18th century England

The question of literary property arose after the expiration of 21 years in 1731, at which point the Stationers' Company lost the right to books, which were already in print when the Statute of Anne came into force. In other words, it was believed that an author had the right to his manuscript indefinitely before it was printed, following which the Statute of Anne would regulate it. However, Kaplan questions –

Did the copyright in published works cease at the expiration of the limited periods specified in the statute, or was there a non-statutory, common law copyright of perpetual duration, with the Statute merely furnishing accumulative special remedies during the limited period?

The booksellers argued that under common law authors had a perpetual right to authorise printing and during 1735 and 1737 the booksellers lobbied in vain for legislation to increase the term of copyright³⁵. Their attempts were unsuccessful and during the first half of the 18th century 'printing and bookselling served a luxury market, which was particularly vulnerable to vicissitudes of fortune among its customers, and therefore to unstable social conditions'³⁶. Isabella Alexander whose doctoral thesis focuses on an examination of the ways in which notions of public interest were instrumental in shaping the contours of copyright law, reaches the conclusion that these bills which were introduced in Parliament did not purely reflect the booksellers' claims but that some provisions were more consistent with protection of the book-buying public than with protecting booksellers against piracies³⁷.

The second-half of the 18th century saw booksellers abandoning the legislature as a means of enforcing their rights and turned their attention to the courts of law. The English cases of *Millar v. Taylor* (1769)³⁸ and *Donaldson v. Beckett* (1774)³⁹, which followed the two *Tonson*

³⁵ Encouragement of Learning Bill, (1735); A Bill for the better Encouragement of Learning by the more effectual Securing the Copies of Printed Books to the Authors or Purchasers of such Copies, during the Times therein to be mentioned (1737) British Library, BS 86/16(1); A Bill for the better Encouragement of Learning by the more effectual Securing the Copies of Printed Books to Authors or Purchasers of such Copies, during the Times therein to be mentioned (1737) House of Lords Parchment Collection, 1714-1718.

³⁶ *Op. cit.*, Alexander I.J., n. 32 at p. 35.

³⁷ *Ibid.*, p. 37.

³⁸ 4 BURR. 2301.

³⁹ 4 BURR. 2407.

cases⁴⁰, tackled this issue. Interestingly, a Scottish case also addressed this issue in *Hinton v. Donaldson* (1773)⁴¹. The Court of King's Bench in *Millar v. Taylor* held that there was a common law right of an author to his copy stemming from the act of creation and that perpetual right was not removed by the Statute of Anne. However, the House of Lords in the case of *Donaldson v. Beckett* overturned this decision one year after the Scottish Court of Session had already arrived at the same ruling in *Hinton v. Donaldson*⁴².

The speeches of Mr. Justice Wills, Lord Mansfield⁴³ and the dissenting opinion of Mr. Justice Yates in *Millar v. Taylor* are of particular interest and lay the basis for the public interest argument. The speech of Mr. Justice Yates is especially thought-provoking and visionary –

All property has its proper limit, extent and bounds . . . the legislature had no notion of any such things as copyright as existing for ever at common law . . . [perpetual copyright] would lead to inconvenient consequences the public may feel . . . instead of tending to the advancement and the propagation of literature, I think it would stop it; or at least might be attended with great disadvantages to it⁴⁴.

The case of *Millar v. Taylor* did not apply to Scotland. Therefore following the *Millar* decision the print industry continued to thrive in Scotland until 1773 when the Scottish case of *Hinton* rejected the notion of perpetual common law copyright. Lord Kames opined –

I have no difficulty to maintain that a perpetual monopoly of books would prove more destructive to learning, and even to authors, than a second irruption of Goths and Vandals. And hence with assurance I infer, that a perpetual monopoly is not a branch of common law or of the law of nature. God planted that law in our hearts for the good of society; and it is too wisely contrived to be in any case productive or

⁴⁰ *Tonson v. Walker* 4 BURR. 2325; *Tonson v. Collins* 1 Black W. 301, 96 Eng. Rep. 169 (K.B. 1761). The two *Tonson* cases involved the works of John Milton's 'old books' whose copyright had expired.

⁴¹ This case against Donaldson was brought in Scotland at the same time that Beckett brought an action against him in England. As reported by Boswell J., in 'The Decision of the Court of Session Upon Question of Literary Property in Hinton against Donaldson' in Parks S., (ed.) *The Literary Property Debate: Six Tracts 1764-1774* Garland Series (New York, London: Garland Publishing Inc.; 1975), pp. 18-19.

⁴² For a detailed discussion of the three cases of *Millar v. Taylor*, *Donaldson v. Beckett* and *Hinton v. Donaldson*, see, *op. cit.*, Alexander I.J., n. 32 at chapters 3 & 4.

⁴³ Lord Mansfield was the strength behind respectable stationers. He had appeared as their counsel in the two *Tonson* cases.

⁴⁴ 4 BURR. 2301 at 2391.

mischief . . . A monopoly would put a final end to the commerce of books in a few generations. And therefore, I am for dismissing this process as contrary to law, as ruinous to the public interest, and as prohibited by statute⁴⁵.

Lord Kames emphasised the commercial consequences of a perpetual right, leading to cheaper books and pointed out that one of the functions of copyright is to provide an economic incentive to the author. He stressed this point of economic incentive by stating –

The Statute of Anne is contrived with great judgement, not only for the benefit of authors, but for the benefit of learning in general. It excites men of genius to exert their talents for composition and it multiplies books both of instruction and amusement. And when, upon expiration of the monopoly, the commerce of all those books is laid open to all, their cheapness, from a concurrence of many editors, is singularly beneficial to the public⁴⁶.

One year later, the court in *Donaldson v. Beckett* considered all the judge's speeches in the English case of *Millar v. Taylor*, but a majority of judges (agreeing with the dissenting opinion of Mr. Justice Yates in *Millar v. Taylor*) found that the Statute of Anne had replaced the common law copyright. The respondents in *Donaldson v. Beckett* argued –

There is nothing in the Statute of Queen Ann to take away that interest or property, to which authors were before entitled, in the publication and sale of their own works. The object of that statute was to secure literary property, by penalties, from piracy and invasion; and though the protection given is only temporary . . . the statute expressly declares, that *nothing contained in it shall prejudice or confirm any right which the universities, or any person or persons, might claim to the printing or reprinting of any book or copy then printed, or afterwards to be printed*⁴⁷ (emphasis added).

The court dismissed the arguments of the respondents and held in favour of the appellants for a limited period of copyright protection. Although a similar decision had already been reached in Scotland, the *Donaldson v. Beckett* case had a profound effect on HEIs in

⁴⁵ Murray J., Some Civil Cases of James Boswell 1772-1774 (1940) *Juridical Review*, 52, pp. 222-251.

⁴⁶ As reported by J. Boswell in 'The Decision of the Court of Session Upon the Question of Literary Property in Hinton against Donaldson . . .' in *op. cit.*, Parks S., (ed.) n. 41 pp. 19-20.

⁴⁷ 4 BURR. 2407 at 2416.

England. For example, under Note 2 in *Donaldson v. Beckett* it is noted that ‘the universities were so much alarmed by this determination, that in the year 1775, they applied for and obtained an act of parliament for securing to them and the colleges of Eton, Westminster and Winchester, the perpetuity in all copies then, or at any time afterwards given to, or acquired by them’⁴⁸. *Donaldson v. Beckett* appeared to have solved the question of literary property. However, it raised a question about the use of copyrighted works by educational establishments during the term of protection. The fact that after the case, the above mentioned educational establishments were successful in securing a legal and perpetual right to all copyrighted works meant that the question of literary property in fact remained unsolved and the need for creating an exception or a well-defined public interest had become important, at least for users of copyright works. Copyright law and the public interest were slowly but surely developing alongside each other.

Following these landmark decisions, the Statute of Anne was amended in 1777 to include musical and dramatic compositions as books⁴⁹ and in 1833 the Dramatic Copyright Act⁵⁰ was created to provide for a public performance right in dramatic works. However, the public interest debate was far from over and continued well in to the 19th century. Although the booksellers attempted to defy the literary property debate through statute and the common law, the years 1774-1842 were instrumental in illustrating the booksellers’ ‘adaptation’ to the limited term of copyright.

Contesting the Statute of Anne and case-law: 1774-1842

The booksellers viewed the Statute of Anne followed by the *Millar*, *Donaldson* cases with some scepticism. Although the booksellers had been defeated by statute and common law, they did not relent in their endeavour to find ways to overcome what they considered inadequate penalties, the limited term and the requirement of legal deposit as set out in the Statute of Anne.

⁴⁸ *Ibid.*, at 2419. The Act of Parliament can be found at 15 Geo. III. Vol. 12, c. 53 at pp. 341-343 – ‘An Act for enabling the two Universities of England, the four Universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in Perpetuity their Copy Right in Books, given or bequeathed to the said Universities and Colleges for the Advancement of useful Learning and other Purposes of Education; and for amending so much of an Act of the eighth Year of the Reign of Queen Anne, as relates to the Delivery of Books to the Warehouse Keeper of the Stationers Company, for the Use of the several Libraries therein mentioned’.

⁴⁹ *Bach v. Longman* [1777] 2 COWP 623.

⁵⁰ Dramatic Literary Property Act 1833 (3 & 4 Will., 4, c. 15).

As regards the perpetual right to copyright being removed by the Statute of Anne, it is interesting, as Isabella Alexander points out, that although booksellers talked of ‘their ruin’ it did lead to new opportunities at the lower end of the book market⁵¹. For example, the Scottish publisher John Bell had considerable success with the publication of small, cheap volumes of Shakespeare and other plays⁵². Furthermore, alongside this positive change, came the rise of the publisher. The 18th century focused on the bookseller who was wholesaler and retailer both, as well as often acting as the commissioner of book and purchaser of copyrights⁵³. From the beginning of the 19th century however, there began to grow a new breed of bookseller who sold only his own publications⁵⁴.

In the late 18th century, the application of steam and stereotype plates had a significant impact on the printing press⁵⁵. Stereotype plates lasted indefinitely, which made it possible for a printer or publisher to produce reprints as soon as a book went out of print, should there be further demand for it. This lessened the publisher’s risk and cut production costs dramatically. Furthermore, Alexander opines that although the general ethos at the time was for booksellers to uphold their monopoly, this was not entirely true⁵⁶. Many of those involved with the book trade expressed fear of the danger of unrestrained competition flooding the market and causing widespread damage. For some this represented merely self-interest.

However, the clause on legal deposit related a different story. The booksellers saw it as a tax and an unfair invasion of property interests, basing this on the existence of a perpetual common law copyright, which had been taken away by the Statute of Anne⁵⁷. They also argued that the deposit provisions discouraged learning. In 1814 a bill was presented to Parliament by booksellers, who commenced by appealing to the general public interest in learning, with the preamble stating that the delivery of books was “a very heavy expense to

⁵¹ *Op. cit.*, Alexander I.J., n. 32 p. 71.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ For the rise of the publisher, see, Pollard G., *The English Market for Printed Books: The Sandars Lectures 1959* (1978) 4 *Publishing History*, 8.

⁵⁵ Plant M., *The English Book Trade: An Economic History of the Making and Sale of Books* (London: Allen & Unwin Ltd.; 1965) 2nd ed., pp. 272-273.

⁵⁶ *Op. cit.*, Alexander I.J., n. 32 p. 74.

⁵⁷ *Ibid.*, p. 81 quoting Turner S., *Reasons for a Modification of the Acts of Anne respecting the Delivery of Books and Copyright* (London: Nichols, Son and Bentley; 1813).

the Authors or Proprietors of such Books and a discouragement to Literature". It provided that the libraries had to pay one third of the retail price of the books they wanted delivered. Booksellers viewed this as a tax on books. Although the bill was strongly contested in Parliament, it finally passed and carried to the House of Lords. The House of Lords made amendments extending the benefit of the increased term to living authors, as well as providing that if an author were living at the end of the twenty-eight year term then copyright would last for the remainder of the author's life. The bill became law on 29 July 1814.

Alexander sums up the period between 1774-1842 by stating that –

The most important rhetorical appeal made by participants in the debate was to the public interest in encouraging learning. Supporters of the deposit rights argued that libraries were places where literature and knowledge were nurtured and that compulsory delivery of books would further these aims. Opponents, on the other hand, characterised authors as disseminators of learning and argued that, if publishers and booksellers were unable to afford the cost of deposit, fewer books would be printed and society as a whole would suffer. In the end, it seems that the vision of the public libraries as nurturers of both literature and authors was the more persuasive one.

The author was slowly gaining in recognition along with educational establishments, the birth place of literature and knowledge. However it was not until 1842 that the question of literary property arose again and copyright law assumed a different shape.

The Question of Literary Property and Public Interest re-examined: 19th Century Britain

The passage of the Copyright Act 1842 re-opened up the debate about literary property and the period of copyright protection was at the heart of this debate. The main proponent in the debate for a natural right of the author was Serjeant Talfourd, a barrister, whilst Lord Macaulay, the famous historian, opposed the idea. The outcome of the debate and the bill was that the period of copyright was extended to the life of the author and seven years after the author's death or a term of 42 years from publication, whichever is longer. The Copyright Act 1842 extended the term considerably from that of the Statute of Anne but it presented a compromise. The author was thus protected for a considerable period of time, after which the author's work would belong to the public domain.

Serjeant Talfourd argued passionately in favour of extending the term of copyright from the existing 28-year term provided by the Statute of Anne to last the life of the author and sixty years after death. He stated –

. . . At the moment when [the author's] name is invested with the solemn interest of the grave – when his eccentricity or frailties excite a smile or shrug no longer – when the last seal is set upon his earthly course, and his works assume their place among the classics of his country – your law declares that his works shall become your property and you requite him by seizing the patrimony of his children⁵⁸.

Talfourd's eloquent speeches and his suggestion of continuing copyright protection sixty years after the death of the author make him a visionary and an individual who was passionate about protecting intellectual creators⁵⁹. One hundred and sixty four years later, Serjeant Talfourd's suggestion for an appropriate copyright term is not far off from what we have now. However, the compromise that was reached ultimately was in line with economic considerations at the time and literary advancement and it struck the all-important balance between creators of literary works and users of these works⁶⁰.

Following the Copyright Act 1842, minor legislative amendments were made – in 1862 the Copyright Act 1842 was extended to take in to account paintings, drawings and photographs⁶¹. In 1882⁶² and 1888⁶³ performance rights in musical works became regulated. During the same time international copyright law had started to develop with the introduction of the Berne Convention 1886⁶⁴ (hereinafter Berne Convention) – and it was this Convention, which brought about significant changes to UK copyright law and opened the gates to copyright exceptions in UK statutory law. The Berne Convention shifted the

⁵⁸ Stewart S.M., *Two Hundred Years of English Copyright Law* [1977] Copyright 228 in *op. cit.*, Davies G., n. 1 p. 34.

⁵⁹ For a discussion of Serjeant Talfourd's views, see, Seville C., *Literary Copyright Reform in Early Victorian England* (Cambridge, New York, Melbourne: Cambridge University Press; 1999), pp. 16-32.

⁶⁰ For the opposing speeches of Serjeant Talfourd and Lord Macaulay and the passage of the Copyright Act 1842, see, *ibid.*, especially chapters 1-3.

⁶¹ Fine Arts Copyright Act 1862 (25 & 26 Vict., c. 68).

⁶² Copyright (Musical Compositions) Act 1882 (45 & 46 Vict., c. 40).

⁶³ Copyright (Musical Compositions) Act 1888 (51 & 52 Vict., c. 17).

⁶⁴ Berne Convention for the Protection of Literary and Artistic Works 1886.

focus further away from printers towards the author and most importantly the user by introducing exceptions to copyright law.

Berne Convention for the Protection of Literary and Artistic Works 1886

The year 1886 saw the adoption of the first-ever international treaty on copyright. The origins of this Convention date back to 1885 when a conference of the French and German authors and publishers associations, the *Société de Gens des Lettres* and *Boersen verein des Deutschen Buchändler*, decided at the international congress of the *Association Litteraire et Artistique Internationale (ALAI)* to attempt to set up a union to provide international protection for their interests⁶⁵. The Berne Union was thus created⁶⁶.

The Berne Convention itself emerged the following year, 1886, out of an official conference organised by the Swiss government. There were nine signatories at that time, of which seven were European⁶⁷. Today there are one hundred and sixty member countries that are signatories to the Berne Convention⁶⁸, making it the largest membership of an international copyright Convention.

The Berne Convention has since been renewed and revised in the following years: 1908 (Berlin), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm) and 1971 (Paris). Each revision was brought about to keep up with changing times. For example, the main reason behind the 1908 Berlin revision was to provide additional protection for authors when their works were reproduced by the new mechanical recording technologies of photography, sound recording and cinematography. The Rome Act in 1928 established the moral rights of the author to

⁶⁵ ALAI was created in 1878 under the presidency of Victor Hugo. A principal objective of the Association was “to achieve international consensus on the rights to be granted to authors” and in 1882 it took up the project of an ‘International Copyright Union’. Also see, Fitzpatrick S., Prospects of Further Copyright Harmonisation [2003] 25(5) *EIPR*, 215-223. To view the text of the Berne Convention, see, <http://www.wipo.org/treaties/ip/berne/index.html> (last accessed 8 June 2006).

⁶⁶ For further background information on the establishment of the Berne Union and Berne Convention, see, Ricketson S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, Reading: The Eastern Press Ltd., 1987); Also see, Sterling J.A.L., *World Copyright Law* (2nd ed.,) (London: Sweet & Maxwell; 2003) chapter 1; Porter V., *Beyond the Berne Convention: Copyright Broadcasting and the Single European Market* (London, Paris, Rome: Academia Research Monograph; 1991), chapter 1.

⁶⁷ The European countries consisted of UK, Belgium, France, Germany, Italy, Spain and Switzerland. The other two were Haiti and Tunis.

⁶⁸ Statistics correct as at May 2006. The most recent member to sign up to the Berne Convention is Nepal. The Convention came into force in Nepal on 11 January 2006.

claim authorship of the work⁶⁹ and also introduced the broadcasting right. The revisions in 1967 and 1971 were very significant as they came at a time of increased or extreme technological advancement and following two regional agreements signed by the Council of Europe⁷⁰. As such, the 1967 and 1971 revisions had to negotiate two major issues (1) to accommodate new technological developments and (2) to reconcile the demands and needs of the First and Third Worlds. Whilst the Berne Convention was successful in overcoming the first issue it was unsuccessful in solving the second.

The Berne Convention is considered to be the linchpin of all copyright protection, and accordingly reflects the balance between protecting the intellectual work of creators whilst also providing the public the freedom to access and build on such works⁷¹. The wording of the preamble to the Berne Convention and in particular the part which states ‘... *In as effective . . . a manner as possible* ...’ implies that a balance be struck between creators and users. The Berne Convention leaves it to the Union Members to decide whether certain categories of works are to be protected. Accordingly, Article 2*bis*(2) (public lectures reproduced by press, broadcast); Article 9 (reproduction right); Article 10 (quotations and illustrations); Article 10*bis* (press and current events); Article 11*bis*(2) (broadcasting and cable retransmission); Article 13 (sound recordings of works) and Article 14*bis*(2)(b) provide for limitations on protection thus reflecting that the need for a balance to be struck between protection and use of protected works by the public were as significant during the time of the Berne Convention as it is now.

From a technical point of view, it is worth noting that the Berne Convention did not employ terminology such as ‘limitations’ or ‘exceptions’, which are commonly used in treaties, directives and statutes today. The Berne Convention employs the verb ‘to permit’ or the adjective ‘permissible’ or ‘to determine the conditions under which’ an act ‘may’ be carried out when referring to free-use⁷². Whatever the terminology may have been, the aim was the same as it is today – to balance the interests between authors and users.

⁶⁹ Article 6*bis* (1).

⁷⁰ European Agreement Concerning Programme Exchanges by Means of Television Films (1958); European Agreement on the Protection of Television Broadcasts signed at Strasbourg (1960).

⁷¹ In this context see also, Ricketson S., ‘The Berne Convention: the continued relevance of an ancient text’ in Vaver D. & Bentley L., (eds) *Intellectual Property in the New Millennium – Essays in Honour of William R. Cornish* (Cambridge UK, Melbourne Australia: Cambridge University Press; 2004).

⁷² All of these words essentially mean the same although ‘exceptions’ appear to signify free uses whilst ‘limitations’ appear to cover both free uses and non-voluntary licences and ‘compulsory licence’ covers any kinds of non-voluntary licences. For an account of the terminology used in the

The 19th century saw the emergence of various principles that would become intrinsic to the law of copyright infringement. The language used is familiar to 21st century copyright lawyers: ‘fairness’, ‘exception’, ‘defence’, ‘fair quotation’, ‘criticism’ and ‘review’ are all words which form the currency of the law of fair dealing today⁷³. This should not however lead us to the mistaken assumption that that the law of the 19th century was the same as it is today just in an earlier stage of development, nor to overlook its extreme instability and internal tensions.

The all-important “three-step” test relating to exceptions and limitations was introduced at the Stockholm revision of the Berne Convention only in 1967, under Article 9(2)⁷⁴. The “three-step” test, which applied only to the reproduction right, introduced three conditions, which must be observed in the introduction of any limitations on, or exceptions to the reproduction right. They stated that –

- (1) the limitation or exception can only apply in certain special cases;
- (2) the limitation or exception must not conflict with a normal exploitation of the work;
and
- (3) the limitation or exception must not unreasonably prejudice the legitimate interests of the author.

The reference to ‘certain special cases’ is intended to indicate that general limitations and exceptions to the reproduction right, for example, a limitation which provides that ‘reproduction of any work may take place for any purpose connected with criticism and review would not be permissible. The second condition covers the unauthorised making of reproductions in spheres, which are usually within the control of the right holder e.g. publication. The third condition covers restrictions, which would prevent the author from participating in the economic benefits flowing from use of the work.

Berne Convention, *see, ibid.*, and also, Ficsor M., *The Law of Copyright and the Internet - the 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford, New York: Oxford University Press; 2002), at pp. 255-257 and *op. cit.*, Ricketson S., n. 66 chapter 9.

⁷³ *Op. cit.*, Alexander I.J., n. 32 p. 118.

⁷⁴ For a guide to the ‘three-step’ test, *see op cit.*, Sterling J.A.L., n. 66 chapter 10; *op. cit.*, Ricketson S., n.66 at pp. 477-489; Heide T., *The Berne Three-Step Test and the Proposed Copyright Directive [1999] EIPR* 105.

Analysis and Conclusion

The reader may logically wonder why exceptions to copyright have attracted so much attention, as opposed to other forms of intellectual property protection such as patent, trademark or design laws. In 1945, Professor Zechariah Chafee put forward six ideals of copyright law in his well-known article '*What is it that the law of copyright is really trying to accomplish?*'⁷⁵ The fifth ideal, titled 'copyright should not stifle independent creation by others', answers the above question. Under this heading, Professor Chafee explains that whilst *nobody else should market the author's book, other people should be able to use it (emphasis added)*. It is the expression in a book and not the ideas, which are protected under copyright law as opposed to patent, trademark or design laws where it is the idea, which is protected.

It is this explanation, accurately presented by Professor Chafee, which has led to the inevitable confusion of the idea/expression fallacy. The idea/expression fallacy arises from the argument that copyright law protects only the form in which ideas are expressed⁷⁶. This argument leads to the confusion of the 'boundaries' of copyright and the all-important balance between the creator and user that need to be struck. The words of Mark Rose clarify these points –

Copyright depends on drawing lines between works, on saying where one text ends and another begins. What much current literary thought emphasizes, however, is that texts permeate and enable one another, and so the notion of distinct boundaries between texts become difficult to sustain⁷⁷.

Professor Chafee's and Mark Rose's arguments of striking the correct balance and finding the boundary between creator and user are further reinforced by an interesting argument presented by Professor Raymond Irwin who was the Head of the University College London School of Librarianship & Archives (now known as School of Library, Archive &

⁷⁵ For an analysis of Professor Chafee's six ideals, see, *op. cit.*, Davies G., n. 32, chapter 9, in particular, pp. 244-247.

⁷⁶ Laddie, Prescott & Vittoria, *The Modern Law of Copyright and Designs* (3rd ed.), Vol. 1 (London, Dublin, Edinburgh: Butterworths; 2000), p. 60.

⁷⁷ *Op. cit.*, Rose M., n. 12 p. 3.

Information Studies)⁷⁸. At an inaugural lecture delivered at University College London in 1957⁷⁹ Irwin stated that unlike in music and art 'reproduction' has no effect in the case of books. By this he meant that a painting if reproduced is in some way altered and generally for the worse. In architecture, particularly in those forms that depend for their value on the movement of light and shade, for example, the curved Byzantine mosaics, photographic reproduction can give but a partial and imperfect reflection of the original. However a typographical reproduction of a book has no more effect on the original work than the printing of a piece of music has on the original composition. Irwin does go on to state the ambiguity in the use of the word 'reproduction'. He explains this by saying that the printed page is not a reproduction of the original creation but an arrangement of conventional symbols of commonly accepted meaning intended to serve as a key to the interpretation of the original. The principal agent in the production of a book is, of course, its writer or author. His literary offspring are always the result of a marriage between his own mind and the communicated experience of other minds, either contemporary or in past time. And since this communicated experience is, in the main, received through the medium of books, the conception and birth of the new book commonly takes place upon the building of existing ideas. As such, Irwin's lecture makes it clear that 'reproduction' is a necessary tool for the development of literary society.

Benjamin Kaplan takes a contrary view –

The author was not, like a crow, to try to patch up a disguise with peacock's feathers; like a bee, he must steal, but then he must transform the sweetness of the flowers. Still in the final count, imitation was essential; innovation was dangerous . . . The literary hero is one who, having little learning or disdaining whatever learning he has, takes a fresh look at nature and feeds his art direct from that source. The confrontation must be personal, not filtered through past authority⁸⁰.

Whether the reader favours the arguments of Chafee, Rose and Irwin or those of Kaplan, ultimately the underlying theme is the same – the literary hero must have some freedom to create and re-create. He must be permitted to 'steal' under certain conditions but then

⁷⁸ See <http://www.slais.ucl.ac.uk/> Prof Raymond Irwin was also elected in 1962 as the first Chairman of the *Library History Group* (LHG) at <http://www.cilip.org.uk/groups/lhg/lhn2003n7.html#intro> (last accessed 8 June 2006).

⁷⁹ *Op. cit.*, Irwin R., n. 10, also see, Savage Ernest A., *The Story of Libraries and Book Collecting* (London: George Routledge & Sons Limited: New York: E.P. Dutton & Co.; 1908).

⁸⁰ *Op. cit.*, Kaplan B., n. 15 p. 24.

through his creativity, must transform the stolen property in to something new. It is these conditions for 'stealing', which are known as 'exceptions' in the present context.

In drawing a conclusion, it is clear that a fair society will always provide for exceptions to rules. The present discussion established this fact before proceeding to look at the UK, which recognises exceptions to intellectual property rights, and hence copyright laws as paramount. The discussion further sought to trace the development of the public interest debate and it must be emphasised that up until the 20th century (in particular up until 1911) the common law right of public interest was the main defence to copyright infringement in the UK. This defence of public interest played a vital role throughout the centuries and was developed especially throughout the 18th and 19th centuries by visionaries such as Mr. Justice Yates in *Donaldson v. Beckett* and Serjeant Talfourd during the passage of the Copyright Act 1842.

As such, this chapter attempted to unravel the story in which copyright exceptions came into being. For the time being, it is evident that the road to creating user's rights was not as straightforward as the road to recognising authors' rights. Up until the 18th century, 'power to the printers' prevailed but this position changed marginally following the Statute of Anne. Whilst the Statute recognised the rights of the author on the one hand, the debate on literary property and public interest was taking place on the other and, for the first time in the history of copyright law, this hinted at the 'balance' between right holders and users which forms a more heated debate in the present day. In considering the specific reasons behind the subtle emergence of this all-important balance between the author and user during the 18th century, one particular feature stands out: the challenge of technology to copyright law and, in the present context, the challenge of the printing machine to copyright law. It is this feature of technological development that has advanced rapidly throughout the years and has constantly challenged copyright law and in turn the balance between the right holder and user.

As a prelude to the following chapter, it must be pointed out that the Imperial Copyright Act 1911 brought about major reform and whilst it gave effect to the Berne Convention, it also provided for statutory exceptions to copyright law. These exceptions have been developed and re-modelled throughout the 20th century at the expense of public interest, which was almost to take a back seat to the growth of copyright statutory exceptions. However, the latter part of the 20th century (in particular 1988) saw copyright law welcoming the common law public interest defence into statute law, even though this was a half-way house. The

reason for labelling it as a half-way house is because although the Copyright, Designs and Patents Act 1988 (hereinafter 1988 Act) recognises the defence of public interest, it is tucked away in section 171(3). The section reads –

Nothing in this part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.

The 1988 Act therefore merely recognises the existence of the public interest defence, but it does raise the question of the practical significance of this section. Two recent cases shed light on the section. In 2001, in the case of *Hyde Park Residence v. Yelland & Others*⁸¹ the Court of Appeal considered the public interest defence in the light of statutory exceptions. The Court rejected a general defence of public interest to an action for infringement of copyright. They argued that copyright is an intellectual property right provided for by the 1988 Act. The 1988 Act contains detailed provisions of the types of acts, which can be carried out by persons without the copyright owner's consent.

They range from fair dealing to use for education, by libraries and for public administration. They . . . set out in detail the extent to which the public interest overrides copyright . . . The 1988 Act does not give a court general power to enable an infringer to use another's property, namely his copyright, in the public interest. Thus a defence of public interest outside . . . the 1988 Act, if such exists, must arise by some other route⁸².

However, in the following year the Court of Appeal in the case of *Ashdown v. Telegraph Group Ltd*⁸³ stated that where part of a work is copied in the course of a report on current events, the 'fair dealing' defence will normally afford the Court all the scope that it needs to properly reflect the public interest in freedom of expression and, in particular, the freedom of the press. The Court emphasised that following the entry into force of the Human Rights Act 1998⁸⁴, the considerations of public interest were paramount. The defence of fair dealing was not considered in this case.

⁸¹ [2001] Ch. 143.

⁸² *Ibid.*, at para. 43.

⁸³ [2002] E.C.D.R. 32.

⁸⁴ The Human Rights Act 1998 came into force in the UK, on 02 October 2000. It gives further effect in the UK to the fundamental rights and freedoms of the European Convention of Human Rights.

Most recently the case of *HRH The Prince of Wales v. Associated Newspapers*⁸⁵ concerned an application by HRH The Prince of Wales (claimant) for summary judgement against Associated Newspapers (defendant) for breach of confidence and infringement of copyright in respect of articles published by the defendant in *The Mail* in November 2005. Blackburn J. rejected the defence of fair dealing for the purpose of reporting current events and criticism and review. Interestingly, the court also rejected the public interest defence under section 171(3) of CDPA 1988 on the basis that to succeed, specific clear public interest considerations would be required over and above those set out in section 30 'fair dealing' defences. It was held that in this case there were none. In summary, the Court held that the defendant had no real prospect of establishing that it had not used substantial part of the journal or that the fair dealing or public interest defences could apply.

The main reason for focusing on the issue of public interest in this chapter was to trace the journey of a common law defence to copyright to the modern day statutory defences, which also incorporate the public interest defence into the statute. However, what is clear from the above two cases is that public interest has more place in the eye of the media and the reporting of current events than in the case of fair dealing for research or private study which is the focus of the present thesis. Therefore, the defence of public interest will not be re-considered in the course of the following chapters, as emphasis will be given to fair dealing for research or private study relating to HEIs.

To conclude the present chapter, the preamble to the Berne Convention must be re-iterated. The preamble which has been mirrored in the revised versions of the Berne Convention continues to be interpreted to mean not only that the creators' rights have to be taken into account but also that the public interests must be given due consideration⁸⁶. At the first 1884 Berne Conference, the Chairman of the Conference, Numa Droz, re-iterated this point in his closing speech:

... due account did also have to be taken of the fact that the ideal principles whose triumph we are working towards can only progress gradually on the so-varied countries that we wish to see joining the Union. Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion,

⁸⁵ [2006]EWHC 522.

⁸⁶ The same principle has been voiced in the preamble to the WIPO Copyright Treaty - 'recognizing the need to maintain a balance between the rights of authors and the larger public interest . . .'; Preamble to the WIPO Performances and Phonograms Treaty - 'recognizing the need to maintain a balance between the rights of performers and producers of phonograms ...'.

by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses ...⁸⁷.

This is correct. If exceptions and limitations are not created for use, for example, in an institution such as a university, 'the ever-growing need for mass instruction could never be met' without the fear of infringement. However, at the same time, Numa Droz is quick to point out that these exceptions should not 'degenerate into abuses' which is very true in the face of present technological advancements which facilitate reproduction of copyright works. Recognising the importance of exceptions and limitations, the Berne Convention was the first international treaty to introduce them and as discussed earlier, these exceptions were soon implemented in signatory states, such as the UK.

⁸⁷ Found quoted in *op. cit.*, Ficsor M., n. 72, chapter 5 – 'Digital Agenda – Limitations and Exceptions' at p. 258.

**THE SHAPING OF MODERN COPYRIGHT
LAW AND ITS APPLICATION TO HIGHER
EDUCATION INSTITUTIONS**

CHAPTER 2

THE SHAPING OF MODERN COPYRIGHT LAW AND ITS APPLICATION TO HIGHER EDUCATION INSTITUTIONS

Introduction

The Berne Convention was undoubtedly significant in the shaping of statutory exceptions to copyright law within its signatory states. However, it was 25 years later, in 1911, that UK embraced this international convention by introducing statutory exceptions in to its legislature through the Imperial Copyright Act 1911 (hereinafter 1911 Act). During these 25 years, the ‘originality’ of copyright was brought into question. In 1897, an article in the *Birmingham Daily News*¹ complained that the law was unable to protect ‘the labour of the brain’. The copyright bills of 1898, 1899 and 1900 attempted to clarify the issue of ‘originality’. The Copyright Association’s bill of 1898 provided that ‘the making of fair and moderate extracts from a book which is the subject of copyright and the publication thereof for the purpose of a review shall not be an infringement’². In 1899, the English case of *Walter v. Lane*³ highlighted the importance of ‘originality’ in literary works. The Court emphasised that ‘originality’ of a work arises from labour, industry and expense as opposed to creativity or literary skill. In the final run-up to the Copyright Act 1911, William Briggs, who published a book examining the Berne Convention and international copyright law in 1906, established that –

It is not that the States wishes to deprive the author of part of his copyright, but that it wishes to free the hands of educationalists and others whose work it is desirable to facilitate for the sake of the public good⁴.

¹ July 10, reproduced in ‘The Author’ September 1, 1897, pp. 91-92, as quoted in Alexander I.J., *The Metaphysics of the Law: Drawing the Boundaries of Copyright Law 1710-1911*, PhD Thesis, (Unpublished) at p. 220.

² *Copyright Bill 1898*, s.5.

³ (1899) 2 Ch. 749; (1900) A.C. 539.

⁴ Briggs W., *The Law of International Copyright (with Special Sections on the Colonies and The United States of America)* (London: Stevens & Haynes; 1906) at p. 395.

The shaping of copyright exceptions had certainly been ignited by the Berne Convention and its development was to continue throughout the 20th century: a century of development. As Briggs pointed out, the exclusive right of the author was still very much alive, but limitations and exceptions needed to be carved out to assist writers and educationalists in the development of a literary society.

This chapter explores the intrinsic link between law, technology and HEIs. The chapter commences by addressing and assessing how the development of technology had an impact on copyright law whilst also considering the manner in which the modern law of copyright was applied to HEIs. The focus of this chapter is to trace the reform and development of copyright law in the 20th and 21st centuries, particularly in considering the manner in which the law affected HEIs. Ever since the Copyright Act 1911 introduced exceptions beneficial to educational establishments, HEIs became dependent upon the copyright exception of 'fair dealing' for purposes of private study and research. Technological developments such as the photocopying machine and, later, the computer made the reproduction of copyright works within HEIs in particular easy and convenient which posed a further threat to copyright law in the UK, and in particular, the fair dealing exception applying to research and private study within HEIs. One of the aims of this chapter is to make the reader aware of the situation of the law when reproduction of copyright works surpasses the scope of the [fair dealing] exception. In relation to this issue, Burrell & Coleman correctly point out that 'users whose actions are covered by an exception do not need to seek a licence'⁵. It is when the user surpasses the scope of statutory exceptions a licence is needed, sometimes through the mechanism of copyright collecting societies. In such a situation the position of the law and HEIs can be questioned. Can fair dealing alone handle it, or is there a need to enter in to a licence agreement with the relevant authors, through copyright collecting societies? As such, the relevance of this chapter to the present thesis stems from these questions which highlight the need for copyright collecting societies in a HE context, in order to curtail and control reproduction of copyright works.

In this context, the chapter will carry out a consideration of the UK law from 1911 and the manner in which it was reformed – leading to the Copyright, Designs and Patents Act 1988 (hereinafter 1988 Act) – which had an immense effect on HEIs. In relation to the 1988 Act,

⁵ Burrell R. & Coleman A., *Copyright Exceptions: The Digital Impact* (Cambridge, UK: Cambridge University Press; 2005), p.172.

the chapter will look at recommendations by the Whitford Committee in 1977 before delving into a detailed account of the passage of the Bill leading to the 1988 Act. With reference to the Act itself, a discussion of sections 29, 36 and 40 dealing with fair dealing, making of reprographic copies within HEIs and the making of multiple copies respectively will be carried out, amongst others.

Thereafter this chapter moves to the digital era and a discussion of the European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society⁶ (hereinafter InfoSoc Directive) and the UK's implementation of it in the form of the Copyright and Related Rights Regulations 2003⁷ (hereinafter Copyright Regulations 2003) will be carried out with the focus firmly kept on the relevant exceptions to copyright. In considering the copyright exceptions in the digital era a brief commentary to the Database Directive and the InfoSoc Directive is set out. Following the brief review of the two Directives, the thesis turns to an analysis of the Copyright Regulations 2003, keeping the spotlight on exceptions and especially, the exception relating to 'non-commercial research'. As such, this part of the chapter most importantly carries out an assessment of the problems, which have arisen from 'non-commercial' research. The underlying question in the present discussion remains the same: what has been the effect on HEIs as a result of the reform of the copyright law in the digital era?

Coping with copying within HEIs – the rules and regulations

When I read an article in a journal which I feel my . . . colleagues should retain I think nothing of putting it through a Xerox 914. It would be almost ludicrous to turn to the publisher for permission to copy⁸.

Although Britain recognized the need to cope with copying as far back as 1709 with the introduction of the Statute of Anne, the need to create boundaries around the permissible limits of *educational copying* came about at the beginning of the 20th century. The

⁶ European Parliament and Council Directive 2001/29/EC of 22 May 2001.

⁷ SI 2003 No. 2498.

⁸ Gipe G., *Copyright and the machine: Nearer to the Dust* (Baltimore: The Williams & Wilkins Co.; 1967) at p. 51.

Copyright Act 1911 introduced the 'fair dealing' proviso. Certain statutory defences were made available in relation to the infringement of copyright of which the most relevant to this chapter is the 'fair dealing' provision which applies directly to HEIs for private study, research and criticism. This proviso is of further importance in the present context in illustrating where the fair dealing boundary ends and where the blanket licence with a copyright collecting society starts.

Section 2(1)(i)-(vi) of the 1911 Act introduced the 'fair dealing' provision in relation to private study and research. Even though the photocopying machine was not invented at the time of the 1911 Act, reproduction of literary, music and artistic works had advanced through printing. Yet at the same time it was recognised that copying should be made available for 'fair' purposes, which would ultimately assist society as a whole – hence the reason behind the inclusion of section 2 which strikes the all-important balance between the creator and user. This Act represented copyright exceptions in its infancy, but is very important as it created the base upon which the 1956 and 1988 Copyright Acts were finally built. In keeping with the focus of this chapter, which surrounds the impact that law and technology has had on HEIs, the emphasis will be on the 1956 and 1988 Copyright Acts.

The advent of films⁹ and television¹⁰ was the main reason behind the introduction of the Copyright Act 1956 (hereinafter 1956 Act), which provided copyright protection for 50 years from publication to films, sound, and television broadcasts. However it may be possible that the emergence of contact photography or Photostat copying assisting in the creation of multiple copies of textual matter was a significant reason, which called for more specific copyright legislation. Recognising that the law had to be adapted to deal with new technology the Copyright Committee 1952 (hereinafter Gregory Committee) was created and a report was published which was instrumental in the creation of the 1956 Act. The Gregory Committee was established –

To consider and report whether any, and if so what, changes are desirable in the law relating [to] copyright in literary, dramatic, music and artistic works with particular

⁹ Although the technology for making movies was invented in 1895, by Frenchman Louis Lumiere, a significant realisation of the potential for film as art occurs with the appearance of D. W. Griffith's 1915 full-length epic, *Birth of a Nation*.

¹⁰ John Logie Baird invented and publicly demonstrated the television on January 26 1926 in his small laboratory in the Soho district of London.

regard to technical developments and to the revised International Convention for the Protection of Literary and Artistic Works ...¹¹

The Gregory Report considered the exception of 'fair dealing' at length and went on to state

—

We now turn to what appear to us to be by far the most important considerations, which arise in connection with the 'fair dealing' proviso. It will have been noticed that fair dealing with any work for the purpose of private study or research does not constitute an infringement of copyright, and there can be no doubt that for generations individual students, by virtue of this proviso or the Common Law, have had protection in making transcripts and extracts from copyright works. Their extracts until quite recently have necessarily been made by the process of hand-copying . . . Of recent years however, conditions have changed, and technical developments such as contact photography or micro-photography have put in to the hands of librarians, students and others means whereby this laborious hand copying can be avoided¹².

Taking the technological changes into account, and the extent to which the existing fair dealing clause can be stretched, the Gregory Committee made the following recommendations in relation to copying from periodicals. The Committee recommended that if an individual requested in writing that he/she needed a single reproduction of part of an issue solely for the purpose of private study, research or review, then that type of copying would come under a libraries and archives exception, which ultimately appeared as Section 7 in the 1956 Act. Furthermore, in addition the recipient of the copy would have to undertake not to sell or reproduce for publication the copy supplied and would be warned of possible liability for infringement of copyright by the misuse of the copy. In elaborating on this recommendation, the Committee laid down the following minimum provisions —

¹¹ *Report of the Copyright Committee 1951*, Presented by the President of the Board of Trade to Parliament by Command of Her Majesty, October 1952 (Cmnd 8662), Preliminary, p. 1.

¹² *Ibid.*, pp. 16-17.

- (a) that the copying is done only by non-profit making bodies, which we should be disposed to specify;
- (b) that the responsible librarian is satisfied that copies are genuinely required for the purposes of research or private study;
- (c) that not more than one copy of any one excerpt is supplied to any one person;
- (d) that the copy supplied does not constitute substantially the whole issue, but is restricted to not more than one article;
- (e) that the excerpts are not supplied at less than cost price; and
- (f) that an undertaking in a form to be prescribed is furnished by the applicant that the extract made will not be used for other than its declared purpose¹³.

As far as copying of books is concerned, the Committee recognised that students should be permitted to make use of technical developments and be spared the laborious task of hand copying, although ensuring at the same time that publishers and authors are not deprived of the reasonable remuneration they may expect from the copying of the book. As such, the Gregory Committee recommended rules for conditions of copying a 'substantial part' of a work which would not in any circumstances be covered by the existing 'fair dealing' exemption which had been drafted quite narrowly. As such, the major difference between periodicals and books was that –

Before any substantial extract is taken application must first be made to the copyright owner if known (or, if not known, to the publishers) to secure the permission of the copyright owners for the extract to be made. If the copyright owner is traced, his permission or refusal to allow copying would settle the matter. If on the other hand the librarian is satisfied that the copyright owner cannot be traced, he should then be permitted to copy, without thereby incurring the penalties of the Act . . .¹⁴

As such, when the 1956 Act came in to force, it showed a marked difference from the 1911 Act. The 1956 Act, in general, represented copyright law in a technologically advanced age. As far as exceptions were concerned, the Act provided for six very comprehensive sections dealing with exceptions to copyright. Sections 6-10 of the 1956 Act are detailed in setting out the provisions, which implemented the recommendations of the Gregory Committee

¹³ *Ibid.*, at p. 19.

¹⁴ *Ibid.*, at p. 21.

Report. Apart from the defence of fair dealing for purposes of research or private study, criticism or review, and reporting current events¹⁵ the 1956 Act also sets out special exceptions in respect of libraries and archives¹⁶, recording of musical works¹⁷, protection of artistic works¹⁸, in respect of industrial designs¹⁹ and for use of copyright material for education²⁰.

The Act reflects an attempt to protect intellectual creations and a need to further existing works, by the fair dissemination of books, journals etc. and knowledge. Specific references to research and private study under the 'fair dealing' provision in the 1956 Act was an indication of the increased use of copying devices such as Photostat or contact photography within educational establishments assisting in the reproduction of copyright works on the one hand and the need to protect copyright owners on the other. The detailed fair dealing provisions meant that expansion in knowledge and research within HEIs through new technological means could be improved without the fear of breaching copyright law.

As such, whilst the expansion of technology had positive effects leading to a more educated society it also paved the way for more adverse knock-on effects, such as mass-copying. Whatever the reasons are, the UK began to face a pressing issue, which needed to be addressed: the issue of reforming the existing copyright laws to meet technological advancements.

Back to the future: lessons learnt in UK

Developments in the late 1970s-1980s

The photocopy boom in the UK took place in the 1960s not long after the 1956 Act had come in to force. Although the photocopying machine or 'electrophotography' as it was first known, was invented by Chester. F. Carlson as far back as 1937, it was not until 1959 that he

¹⁵ Section 6.

¹⁶ Section 7.

¹⁷ Section 8.

¹⁸ Section 9.

¹⁹ Section 10.

²⁰ Section 41.

really experienced success with the Model 914, the first-ever fully-automated photocopier²¹. This machine was so popular that by the end of 1961 Xerox had nearly \$60,000,000 in revenue. By 1965, revenues leaped to over \$500,000,000 per annum²². In terms of reproduction of literary works, this was a huge leap in the technological world but a step backwards for right holders attempting to protect their copyright works from such easy access to reproduction.

Recognising that UK copyright law needed to be adapted to take into account the ease of copying brought about by technological developments such as the photocopying machine and the computer which was in its infancy, at the time, the *Committee to consider the Law on Copyright and Designs*, chaired by the Honourable Mr. Justice Whitford (the Whitford Committee) was created and a report published in 1977²³. The Whitford Committee looked at the weaknesses of the Copyright Act 1956 and at an Australian case – *Frank Moorhouse v. University of New South Wales*²⁴. Drawing on those experiences the Whitford Committee considered how copyright law could be reformed and adapted to meet the technological advancements, the most pressing being to find the correct balance which would take in to account the public's freedom to use technological developments such as copying machines whilst attempting to protect the rights of copyright holders.

The Whitford Committee Report, March 1977

With regard to the Copyright Act 1956 the report published in 1977 by the Whitford Committee pointed out that the main drawback in the 1956 Act was that it did not define the 'scope' of the 'fair dealing' exception nor how large a part of a book could be copied by a library under section 7(3)²⁵. Almost a decade after the Act had come in to force, in 1965, the Society of Authors along with the Association of Publishers, recognising this gap offered

²¹ Information from About.com at

<http://inventors.about.com/gi/dynamic/offsite.htm?site=http://members.tripod.com/%7Eearthdude1/xerox/index.html> (last accessed 1 June 2006)

²² *Ibid.*

²³ A special committee on general copyright revision reported its findings and recommendations in a publication entitled *Copyright and Designs Law: Report of the Committee to Consider the Law on Copyright and Designs*, commonly referred to as the Whitford Committee Report after its chairman, Justice Whitford. (Cmnd 6732, Her Majesty's Stationery Office, March 1977).

²⁴ (1975) 133 CLR 1. Discussed in detail in Chapter 4.

²⁵ *Op. cit.*, Whitford Committee Report, n. 23 at pp. 56-57.

guidance in a joint statement entitled *Photocopying and the law*²⁶. The guidance which was offered confirmed that copying under the 'fair dealing' provision will not be 'unfair' if for the purposes of research or private study, a single copy was made from a copyright work of a single extract not exceeding 4000 words or a series of extracts (of which none exceeds 3000 words) to a total of 8000 words, provided that in no case the total amount copied exceeds 10% of the whole work; poems, essays and other short literary works were to be regarded as whole works in themselves²⁷.

Further, the Whitford Committee also raised the point that, although the Gregory Committee of 1952 did not make any specific recommendations for educational exceptions, its passage through Parliament resulted in certain restricted educational exceptions, which were incorporated in Section 41 of the 1956 Act. Although this section gives a limited right of reproduction, it expressly excludes (except in case of examination questions) reproduction by any process 'involving the use of an appliance for producing multiple copies'. In other words, section 41 excluded reproduction of copyright works by the use of a photocopy machine. As such, section 41 came under attack both on the grounds of uncertainty and also because it was felt to be too narrow in scope according to educationalists²⁸.

Educationalists called for greater freedom of action and protested against the need to obtain permission to make multiple copies within educational establishments. During the time this issue was being debated, the Council for Educational Technology pointed out that the main distinction between a researcher and a teacher lies in the fact that the teacher will want to make multiple copies as opposed to the researcher who will need only a single copy. As such the Council for Educational Technology suggested a dual approach for education: extended fair dealing provisions and a blanket licensing system through the system of collecting societies²⁹. It is interesting to note that at the time this recommendation was made, the publishers were not very much in favour of blanket licensing, whilst authors and composers were generally in favour of it. Collecting societies that administer blanket licensing such as the Copyright Licensing Agency (CLA) have a clear majority of publishers

²⁶ Society of Authors (Great Britain), *Photocopying and the Law a guide for librarians and teachers and other suppliers and users of photocopies of copyright works* (1965).

²⁷ *Ibid.*, p. 2

²⁸ Cmnd 6732 (March 1977) at p. 65.

²⁹ *Ibid.*, pp. 65-66.

as members and not many authors. The reason most probably is because there 'is little evidence of a demand for royalties by academic authors. These authors generally are not dependent on royalties from their writing for a living on the whole and are more interested in the esteem of their colleagues'³⁰. This re-iterates the point that academic authors are more interested in the incentive-based approach as reputation and promotion are a better return in the academic world rather than remuneration in the form of royalties. For example, it is the publisher rather than the author who normally enjoys the periodical rights.

Around 1970, the British Copyright Council had also expressed favour of a blanket licensing solution to the issue of making multiple copies whether for education or otherwise³¹, and suggested that the jurisdiction of the existing Performing Rights Tribunal be extended to deal with disputes between users and collecting societies as to the terms and costs of licences. Furthermore, having learnt lessons from Australia, the Whitford Committee voiced the concerns raised by the British Copyright Council in relation to reprographic reproduction of works and their costs. In June 1974, following the Australian case of *Moorhouse*, the Attorney-General of Australia appointed a committee under the chairmanship of Mr. Justice Franki to examine reprographic reproduction of copyright works in Australia. Referring to the developments brought about by the Australian committee, the Whitford Committee recommended alterations to the copyright laws of UK, and focused on the proper balance between owners of copyright and users of copyright material³². The British Copyright Council and the Whitford Committee considered these recommendations. Thereafter, the Whitford Committee recommended that the concept of collecting societies be extended to educational establishments and a copyright collecting society dealing with the copyright of literary works be set up in UK.

The Green Paper, July 1981

Reform of the Law Relating to Copyright, Designs and Performers' Protection, a Consultative Document³³ was produced in July 1981 (Green Paper) to invite public comment on proposals made for the revision of the law. The Green Paper recognised that –

³⁰ *Ibid.*, p. 67.

³¹ See, Whale R.F., *Comment on Copyright* (London: British Copyright Council; 1969); British Copyright Council, *Photocopying and the law* (London: British Copyright Council; 1970).

³² Cmnd 6732 (March 1977) at p. 61.

³³ Cmnd 8302 July 1981.

There is a great deal of copying of copyright works in private and public organisations and in schools and libraries of which undoubtedly a significant proportion would be acceptable as fair dealing but a great deal more of which constitutes an abuse of the exception, in particular in the taking of multiple copies of the same work . . . Confronted with this problem, Whitford recommended that the 1956 Act should be amended to encourage the introduction of blanket licensing in the field of reprography . . . Nevertheless, Whitford considered that blanket licensing could be undermined by use of the exceptions provided for in sections 6 and 7, and therefore recommended that as and when licensing schemes came in to existence, the latitude given by section 7 (library exceptions) should not apply and section 6 should not allow facsimile copies to be made for research or private study³⁴.

Accordingly, the Green Paper made it clear that the 'scope' of the fair dealing provision within the 1956 Act could not cover the making of multiple copies within schools, universities, libraries etc. The Green Paper confirmed that the Government was prepared to consider limiting the exceptions of section 7 so as to exclude the related production of multiple copies of the same material in order to avoid an abuse of the exception. The Government also intended to follow Whitford Committee's recommendation and limit the 'research and private study' exceptions of sections 6 and 7. Finally, the Government accepted Whitford's proposal that a Copyright Tribunal be established to settle disputes which may arise from the introduction of a licensing scheme relating to reprography.

Further developments 1981-1986

Following the proposals made in the Green Paper of July 1981 the British Copyright Council³⁵ addressed the issue of 'fair dealing' once again in 1982 and confirmed the position which had been recommended by the Whitford Committee and agreed by the Government. One year later, in December 1983, a second Green Paper was presented to Parliament by the Prime Minister at that time, The Rt. Hon. Margaret Thatcher, titled *Intellectual Property*

³⁴ *Ibid.*, at pp. 9-10.

³⁵ De Freitas, D., *A Brief Guide to Copyright in the United Kingdom* (London: British Copyright Council; 1982).

*Rights and Innovation*³⁶. This Command Paper focused very much on patent rights and how best to support the commercialisation of ideas, and in particular how to help small but enterprising firms. Later, three further Command Papers were published, all in 1985, to consider the manner in which HEIs should embrace and adapt to the reform of copyright law. The first, a Green Paper entitled *The Recording and Rental of Audio and Video Copyright Material*³⁷ suggested that the audio and video tape levies proposed in respect of home taping could also provide a solution to the difficulties faced by educationalists that wish to record copyright material for teaching purposes. The second was also a Green Paper titled *The Development of Higher Education in to the 1990's* and was produced in May 1985³⁸ and was followed closely by the *Future Strategy for Higher Education in Scotland: Report of the Scottish Tertiary Education Advisory Council on its Review of Higher Education in Scotland*, December 1985³⁹.

All of these Command Papers (except the Command Paper of December 1983) are reflective of one feature: expansion within the Higher Education (HE) sector. The expansion of HEIs had begun in the 1960s and expanded at a rapid pace in parallel to the technological developments at the time. During this time, the widespread use of the photocopy machine posed a serious threat to copyright law especially within HEIs. Although the computer had also made its mark by the early 1980s following the introduction of the personal computer, reproduction of textual matter through the computer was not commonplace. This is because schools and universities focused on teaching computers as ends in themselves, not as a means to an end (i.e. as tools to assist with other tasks). As such, teaching computers led to numerous software courses, word processing, databases, desktop publishing etc. It was not until the early 1990s that the advent of the Internet by Tim Berners-Lee revolutionised the use of the computer and opened up the floodgates to reproduction of copyright material.

In the early 1980s, the country's education system approached computer literacy from a one-dimensional standpoint. Rather than viewing a computer as a learning tool, a computer was viewed primarily as a technical programming tool, as an end in

³⁶ *Intellectual Property Rights and Innovation* (London: Her Majesty's Stationery Office; 1983), Cmnd 9117.

³⁷ Cmnd 9445 (February 1985).

³⁸ Cmnd 9524 (May 1985).

³⁹ Cmnd 9676 (December 1985).

itself. In the classroom, the concentration was on how to make the computer work, not on discovering how the computer could work with us and for us⁴⁰.

Therefore it was reproduction through photocopying which posed the most serious threat and created a greater awareness of the infringement of copyright law in the UK during the time of the Whitford Committee. Attempts were made to reform the law in order to take in to account the technological devices, which assisted in such infringement activity.

The White Paper, April 1986⁴¹

The 1986 White Paper titled *Intellectual Property and Innovation* was published in two parts. Whilst Part I was based on the public responses to the 1983 Green Paper, *Intellectual Property Rights and Innovation*, Part II set out the Government's proposals for reform of the law of copyright and related rights taking into account the Whitford Committee's report, the Government's Green Paper of 1981 and the Government's Green Paper of 1985 titled *The Recording and Rental of Audio and Video Copyright Material*⁴². The first two items in Part II are of relevance to the present discussion.

In 1981 the Government recognised that students and libraries should not be discouraged from using the modern technological tool of the photocopier for copying, which was for manifestly fair dealing purposes. There were however, groups of right owners who believed that licensing of photocopying of their material was not in their commercial interests, and that they should retain the exclusive right to control, and if necessary to prohibit, copying⁴³. However, as the exclusive right to control would have proved to be a laborious task soon after the Green Paper was published in 1981, authors and publishers formed the Copyright Licensing Agency (CLA) in 1982 in order to establish licensing schemes in respect of copying in schools, colleges and other institutions where extensive photocopying was being carried out.

⁴⁰ Bowmen Alden S., *The Role of Technology in Preparing Children for the 21st Century* at <http://www.computerlearning.org/articles/Prepare.htm>

⁴¹ Department of Trade and Industry, *Intellectual Property and Innovation* (London: Her Majesty's Stationery Office; 1986), Cmnd 9712.

⁴² Cmnd 9445 (February 1985).

⁴³ *Op. cit.*, Cmnd 9712 (1986) n. 41 chapter 8 'Photocopying and exceptions to copyright', p. 46, para. 8.3.

Taking these latest developments into account, the 1986 White Paper established that in order to permit educational establishments to make multiple copies of a very small proportion of any copyright work for group instructions, such establishments would be freely licensed to copy up to 1% of the work per quarter annum if no licence was available⁴⁴. In these circumstances, copyright owners could claim remuneration for copying of their work by offering an appropriate licence under the newly established CLA, at which time the entitlement to copy free of charge would cease and be replaced by the payment of royalties.

These recommendations reveal that there was still potential for difficulties to arise in respect of copying above the 1% level if individual copyright owners did not join licensing schemes or if particular classes of work were not covered by any scheme. The White Paper went on to set out the powers of the Secretary of State in relation to copyright owners who were seen to create a barrier towards striking a balance between the user and creator by not engaging in licensing schemes –

(a) if, after considering any representations, he is satisfied that the refusal by an individual copyright owner to join an existing scheme is unreasonable, he may make an Order that the owner should be treated as if he were a member of that scheme. Such Orders would be subject to appeal.

(b) Following a recommendation to that effect by an inquiry appointed by him, the Secretary of State may make an Order compulsorily licensing a particular class of work⁴⁵.

Specifically in relation to the making of multiple copies, the White Paper confirmed that this would be excluded from the library exception then represented by section 7 of the 1956 Act⁴⁶. In relation to the 'scope' of fair dealing and the lack of guidance offered by statute, the Government was of the opinion that no general formula along these lines could be devised which would be appropriate in all cases. Furthermore the Government felt that ultimately it would lead to unfairness either to copyright owners or to users. This would mean that any statutory definition would have to be framed in general terms, which did not produce any

⁴⁴ Cmnd 9712 (1986) p. 47, para. 8.8-8.10.

⁴⁵ *Ibid.*, p. 47, para. 8.9.

⁴⁶ *Ibid.*, p. 48, para. 8.10.

specific advantages, and therefore it was confirmed that a definition of fair dealing would not be included in the new legislation⁴⁷.

Passage of the Bill through Parliament – Parliamentary Debates, 1988

The debate of the Bill in Parliament in session 1987-88 raised a number of interesting issues in relation to fair dealing and photocopying within educational establishments leading to the making of multiple copies. The relevant arguments are set out below.

In relation to the fair dealing proviso, Mr Tony Blair MP raised the following points –

If there is fair dealing in copying for the purposes of research or study, there is exemption from copyright infringement. Two problems arise on that. First, the Government has decided – so far at least – that there should be no payment by industry for copies of publications done for commercial research. I understand that the publishers have come back to the Government with a scheme, which is at least worth looking at, for some form of compensation to the authors of publications that are copied. We have not taken a position on that at this stage, but we shall have a look at it during the passage of the Bill.

I point out too that, as far as I am aware, the United States has the Copyright Clearance Centre, which is its attempt to deal with the problem, and apparently it is working⁴⁸.

However, the issue which raised the most amount of debate was how wide the fair dealing exception should be, i.e. should the scope of fair dealing for research and private study be extended to commercial copying as well? A number of arguments were presented and a very effective argument in favour of including commercial copying within the fair dealing proviso was presented by Mr. Eric Martlew MP. In relation to education and university services, which benefit from the fair dealing provision he argued –

Those institutions are under licence to the Copyright Licensing Agency and pay money to it. I understand that, last year, the Government paid £900,000 to that authority on behalf of those institutions. It appears that we have dual standards.

⁴⁷ *Ibid.*, para. 8.11-8.13.

⁴⁸ *Hansard*, vol. 132, House of Commons, 28 April 1988, col. 593.

Either the Government should make an amendment to get rid of that payment or they should make private companies pay the same. It is all right to pay public money to the Copyright Licensing Agency, but it does not appear all right to pay private money to that authority. That smells of duplicity and I hope that the Minister will explain that position⁴⁹.

Mr. Blair reinforced the argument presented by Mr. Martlew by stating –

To treat photocopying for commercial ends in a different way from photocopying for private research or study is wrong in principle. Commercial companies claim the privilege of copyright for themselves in many other cases. The problem is made all the more acute by the fact that educational establishments will be subjected to a licensing scheme. They will pay about £1 million a year to use copyright material ... a licensing scheme is already in existence for educational establishments. It is bizarre that large companies such as BP, ICI and Shell should be able to use commercial research and pay no money for photocopying when schools have to do so. The Minister has not answered that point⁵⁰.

It is clear that the Members of Parliament (MPs) took a stand against the position that there should be no payment by industry for copies of publications done for commercial research. The present writer is in agreement with the views of MPs: if educational establishments have to pay about £1 million a year to the Copyright Licensing Agency to use copyright material, it is just that industry follow in the same footsteps too. This point was ultimately addressed and answered by the Minister although there still remained some ambiguity as to what was meant by 'commercial copying'. The 1988 Act, excluded commercial copying from the ambit of the fair dealing provision, but without a definition as to what was meant by 'commercial' the position remained unclear. Although commercial copying was excluded from fair dealing, it is interesting to note that at the same time, the Newspaper Licensing Agency (NLA) and its Press Cutting Agency, which came about almost a decade later – in 1996 – were permitted to engage in commercial copying. For example to make copies of

⁴⁹ *Hansard*, vol. 138, House of Lords, 25 July 1988, col. 133.

⁵⁰ *Ibid.*, col. 136.

newspaper cuttings by fax or photocopy or to digitally scan newspaper cuttings for clients who hold a NLA license⁵¹.

The preceding pages identified the areas from the recommendations made by the Whitford Committee, Green Paper of 1981 and the White Paper and the Parliamentary debates, which surrounded issues relating to HEIs and reproduction of copyright works within these establishments. It is timely to consider the manner in which these recommendations and debates were incorporated into the law. It is not the intention to enter into a detailed discussion of the entire 1988 Act. Rather, the important provisions relating to HEIs will be highlighted and commented upon before moving on to consider, in more detail, the more recent legislation and its impact on HEIs.

The Copyright, Designs and Patents Act 1988

The coming into force of the 1988 Act heralded a new era in copyright law in the UK. Apart from consolidating the copyright law, the 1988 Act came a long way in attempting to strike a satisfactory balance between the creators and users. The 1988 Act, in general, was considered to be more accessible to the layperson and the provisions were drafted in a clearer and more precise manner. However, whilst the 1988 Act was considered to be a massive breakthrough in copyright law, how much of a positive effect did it have on HEIs? As such, the provisions of the 1988 Act, which are most relevant for this consideration, will be selectively discussed.

Section 29 - fair dealing

The fair dealing provision for purposes of research and private study is found in section 29, and was more clearly drafted than in the 1956 Act. Yet it remained a restrictive provision. In accordance with the White Paper 1986, the statute did not offer any guidance as to the 'scope' of fair dealing. As such, the section read –

⁵¹ Newspaper Licensing Agency at <http://www.nla.co.uk/> (last accessed 20 July 2006). NLA was set up in 1996 by the UK national newspapers to manage newspaper copyright collection. The Press Cutting Agency offers two types of licences to their client: Paper Licence Rights and Digital Licence Rights.

29. –(1) Fair dealing with a literary work, [other than a database] . . . for the purpose of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(3) Copying by a person other than the researcher or student himself is not fair dealing . . .

Furthermore, the 1988 Act, keeping in step with the recommendations of the White Paper 1986, also omitted commercial copying within the capacity of fair dealing. It was established that to include commercial copying within the ambit of fair dealing would prove controversial and those in industry argued ‘that to include commercial research would impose additional costs on industry which would decrease its world-wide competitiveness and that any revenue raised would be swallowed up by the administrative costs of collecting it’⁵². The Government, clearly influenced by this argument, dropped the restriction, hence, the reason why it does not appear in the 1988 Act.

Section 36 – reprographic copying by HEIs

In relation to ‘reprographic copying by educational establishments of passages from published works’ the 1988 Act went on to implement the recommendations made in the White Paper 1986⁵³. Section 36 the 1988 Act reads as follows –

36. –(1) Reprographic copies of passages from published literary, dramatic . . . works may, to the extent permitted by this section, be made by or on behalf of an educational establishment . . .

(2) Not more than one per cent of any work may be copied by or on behalf of an establishment by virtue of this section in any quarter, that is, in any period 1 January to 31 March, 1 April to 30 June, 1 July to 30 September or 1 October to 31 December.

(3) Copying is not authorised by this section if, or to the extent that licences are available authorising the copying in question and the person making the copies knew or ought to have been aware of that fact.

This section offers the opportunity for educational establishments to copy 1% of a published work free of charge in any quarter year. It is an interesting section for the reason that the

⁵² *Hansard*, vol. 138, House of Lords, 25 July 1988, col. 135.

⁵³ See above, pp. 58-59.

practicality of the section is almost non-existent at a time when photocopy machines had become freely available. For example, 1% of a published work which is 100 pages in length, will amount to the legal copying of one single page which can easily be hand copied. Secondly, section 36(2) above is immediately qualified by the very next sub-section (3), the effect of which is that HEIs are urged to take out copying licences from the newly-established Copyright Licensing Agency (CLA) for the reproduction of copyright works, if the copying through appliances such as photocopy machines and computers exceeds 1% of any work. In other words, the insertion of this section is very much a warning for educational establishments to take out copying licences or be held liable for copyright infringement.

It is also interesting that one of the recommendations of the White Paper 1986, which is relevant in the present context, was not included in the 1988 Act. The White Paper 1986 flagged up the difficulties surrounding the 1% copying if individual copyright owners were not to join licensing schemes such as those administered by the CLA, or if particular classes of work were not covered by any scheme. Taking this difficulty into account the White Paper 1986 recommended that the Secretary of State be appointed with certain powers to urge copyright owners to join such schemes, if the reason for not joining was based on 'unreasonable' grounds. What was meant by 'unreasonable' was not defined in the White Paper 1986 and ultimately the recommendation did not make it in to the Bill or to the 1988 Act. However sections 117-128 of the 1988 Act confer powers upon the Copyright Tribunal in cases of setting up licence schemes or disputes arising from such schemes. For example, the 1988 Act sets out situations which could be deemed as 'unreasonable' in relation to these schemes and which could be taken before a Copyright Tribunal. They include amongst others—

- Reference of *proposed licensing scheme* to tribunal (section 118);
- Reference of *licensing scheme* to tribunal (section 119);
- Application for *grant of licence in connection with licensing scheme* (section 121);
- Effect of *order of tribunal as to licensing scheme* (section 123); and
- Reference to tribunal of *expiring licence* (section 126).

Therefore, although the 1988 Act lacked a definition of 'unreasonable' in the context of copyright owners not joining licensing schemes, the Act provided for a number of possible

‘unreasonable’ circumstances, some of which have been listed above, which can be taken before the Copyright Tribunal.

Sections 37, 38, 39 – Users who wish to make copies within libraries and archives

Sub-section 2(a)-(c) of sections 38 and 39 make it clear that copying from a periodical or published work respectively will not amount to infringement of copyright if –

- (2)(a) The copies are supplied only to persons satisfying the librarian that they require them for purposes of research or private study and will not use them for any other purposes;
- (b) That no person is furnished with more than one copy of the same article;
- (c) That persons to whom copies are supplied are required to pay for them a sum not less than the cost attributable to the production⁵⁴.

The sub-sections of sections 38 and 39 are clear on three factors:

- (1) that the copies are used only for research or private study;
- (2) only one copy of the said published article may be copied; and
- (3) there will be an appropriate charge attached to the making of such copies.

Section 37 makes it clear that where a user wishes to copy an article for the purpose of research or private study from a periodical or part of a published work within a library (which could be HEI or public) or an archive, the responsibility will lie with the librarian or archivist who will be required to be satisfied about the making or supplying a copy of a work by/to the user. In accordance with section 37 –

- 37. –(2)(a) The librarian or archivist may rely on a signed declaration as to that matter by the person requesting the copy, unless he is aware that it is false in a material particular; and
- (b) In such cases as may be prescribed, he shall not make or supply a copy in the absence of a signed declaration in such form as may be prescribed.

⁵⁴ Section 38(2)(a)-(c); section 39 (2)(a)-(c), CDPA 1988.

Whilst section 37 clarifies the position in relation to copying of copyright works by users using libraries and archives, it neither addresses nor solves the issue of walk-in copying. Walk-in copying is where an individual presents himself or herself at a self-service copier or to a librarian with a request for them to make copies but cannot claim fair dealing and is not otherwise licensed. In this situation the user has to declare what is being copied, pay a fee to the library and in turn will receive a voucher stating that the copying is legal. The Whitford Committee report recommended that the charge for using coin-operated machines within libraries should be 5p per sheet and the responsibility would lie with the user if the supplier posted notices such as 'The responsibility for reproduction of copyright matter lies with the customer' or 'Users should not reproduce copyright material unless authorised to do so'⁵⁵. It is this recommendation, which has been translated in to the 1988 Act as section 37. The question, which comes to mind, is: does section 37 cover such a situation? Unfortunately, the wording under section 37 is not clear in this regard and sets out that the copying within a library or archive relates to copying purely for fair dealing purposes. The reason for such an implication arises from the reading of the sections 38 and 39 which clearly states that a librarian authorising a declaration must comply with a number of prescribed conditions, of which one is fair dealing.

It is clear that sections 37, 38 and 39, which relates to making copies with libraries and archives for purposes of research and private study are restricted to the sole purpose of fair dealing. These sections may offer protection to a matriculated student within an HEI, but the same will not be true for an independent researcher carrying out research into a particular area. As such it is restrictive.

Section 40 – Making of multiple copies

One further provision in the 1988 Act, which led to some controversy, is section 40, 'Restriction on production of multiple copies of the same material'. This section stipulated that –

⁵⁵ *Op. cit.*, n. 23 p. 33.

40. –(1) Regulations for the purposes of sections 38 and 39 shall contain provision to the effect that a copy shall be supplied only to a person satisfying the librarian that his requirement is not related to any similar requirement of another person.

(2) The regulations may provide –

(a) that requirements shall be regarded as similar if the requirements are for copies of substantially the same material at substantially the same time and for substantially the same purpose; and

(b) That requirements of persons shall be regarded as related if those persons receive instruction to which the material is relevant at the same time and place.

This section effectively prohibits the making of ‘course packs’ within HEIs. This prohibition ultimately resulted in a case being taken up by the Universities UK (UUK) against the Copyright Licensing Agency (CLA)⁵⁶. In this case before the Copyright Tribunal ‘course packs’ were described as ‘a compilation (whether bound or loose-leaf) of four or more photocopied extracts of Licensed Material from one or more sources which compilation: (a) exceeds twenty five pages of such Licensed Material; and (b) is intended to provide the students registered on a Course of Study with a compilation of materials designed to support the teaching of that Course of Study; and (c) is prepared and distributed in advance of and/or during a Course of Study and either piecemeal or in one batch⁵⁷. In relation to section 40 it must be re-iterated that whilst this section attempted to protect the rights of copyright holders, it imposed a massive burden upon educational establishments, where course packs had become common-place following the wide-spread use of the photocopy machines and computers.

Copyright law in the digital era – developments in the 21st century

Background to the copyright exceptions in the Information Society Directive

Although the photocopy machine appeared to be the ultimate threat during the 1960s-1980s, copyright law’s true challenger was yet to come. It was the ingenuity and foresight of Bush Vannevar, nearly 60 years ago, which finally led to Tim Berners-Lee’s invention of the

⁵⁶ *UUK v. CLA* [2002] R.P.C. (36), 693. Considered in detail in Chapter 6.

⁵⁷ *Ibid.*, at para: 44, p. 704.

World Wide Web in 1989⁵⁸. In 1945 Vannevar created a device known as the Memex, a device which an individual could use to store all his books, records and communications and which was mechanised so that it could be consulted with speed and flexibility⁵⁹. The World Wide Web (WWW) is an Internet-based hypermedia initiative for global information sharing.

Hypermedia is a term used as a logical extension of the term hypertext, in which audio, video, plain text, and non-linear hyperlinks intertwine to create a generally non-linear medium of information. . . The World Wide Web is a classic example of hypermedia, whereas a movie on a DVD is an example of standard multimedia. The lines between the two can (and often do) blur depending on how a particular technological medium is implemented⁶⁰.

WWW is said to be the natural advancement of the original Memex device⁶¹. However, it is important to note that the Web is not identical to the Internet; it is only one of the many Internet-based communication services. From its start in 1989 the World Wide Web grew rapidly and by 1993, 50 known servers were identified. 1994 was hailed as the 'Year of the Web'⁶², which accelerated the technology, but questioned the strength of law to keep up with such a device.

Similar to the 1956 Act, which was closely followed by the coming into being of the photocopying machine, the 1988 Act was very closely followed by Tim Berners-Lee's

⁵⁸ The internet evolved about 40 years ago and was originally designed for the Department of Defence to connect computers in just about any environment. Term originated by author William Gibson in his novel *Neuromancer*. In his novel Gibson goes on to explain that the word "cyber" is derived from 'Cybernetics': *kybernetikae* in Ancient Greek, the art of steering as a good helmsman. Gibson further describes 'Cyberspace' as "the invisible, intangible world of electronic information and processes stored at multiple interconnected sites, with controlled access and manifold possibilities for interaction".

⁵⁹ See, http://en.wikipedia.org/wiki/Vannevar_Bush for further information about Vannevar and the memex device (last accessed 08 June 2006).

⁶⁰ Definition taken from Wikipedia at <http://en.wikipedia.org/wiki/Hypermedia> (last accessed 1 June 2006).

⁶¹ See

<http://public.web.cern.ch/Public/Content/Chapters/AboutCERN/Achievements/WorldWideWeb/WWW-en.html> (last accessed 1 June 2006).

⁶² Information from CERN at

<http://public.web.cern.ch/Public/Content/Chapters/AboutCERN/Achievements/WorldWideWeb/WebHistory/WebHistory-en.html> (last accessed 1 June 2006).

invention of the WWW in 1989. The 1990s saw attempts by the law to keep up with the fast-growing Internet. Between the years 1989-2001, there were a number of Treaties, Directives which were brought in to force⁶³. However, in the present context of considering HEIs and the development of exceptions applying to such institutions, the most important piece of legislation relevant for the present discussion is the Database Directive⁶⁴. Article 6 of this Directive sets out the exceptions to restricted acts. Article 6(2)(b) reads as follows –

6. –(2)(b) Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:

Where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.

This was the first time that ‘non-commercial’ was used in a European Directive in relation to an exception for research, before it went on to create a number of problems in the later Information Society Directive. There are no reported cases to date based on the ‘non-commercial’ proviso applying to ‘the sole purpose of illustration for teaching or scientific research’. However, the Database Directive, which was implemented in the UK as The Copyright and Rights in Databases Regulations 1997⁶⁵ has given rise to a large number of cases⁶⁶. Of these cases, the most relevant and current case is *British Horseracing Board Ltd., & Others v. William Hill Organisation Ltd.*, which considered the point of substantial copying. On the point of ‘substantial’ copying Lord Justice Pill stated –

However, investment in the selection, for the purpose of organising horse racing, of the horses admitted to run in the race concerned relates to the creation of the data,

⁶³ Trade Related Aspects of Intellectual Property 1994, WIPO Copyright Treaty (WPT) 1996, WIPO Performance and Phonograms Treaty (WPPT) 1996.

⁶⁴ Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases (11 March 1996).

⁶⁵ SI 1997 No. 3032. This statutory instrument implements Directive 96/9/EC on the legal protection of databases in the UK. It came into force on 1 January 1998.

⁶⁶ *British Horseracing Board Ltd and Others v. William Hill Organisation Ltd* [2005] E.W.C.A. Civ. 863 CA (Civ Div); *Fixtures Marketing Ltd v. Oy Veikkaus Ab* [2005] E.C.D.R. 2 ECJ; *Navitaire Inc v. Easyjet Airline Co, Bulletproof Technologies Inc* [2005] E.C.D.R. 17; *Paperboy* [2005] E.C.D.R. 7 BGH (Ger); *Danske Dagblades Forening (DDF) v. Newsbooster* [2003] E.C.D.R. 5 Byret (Copenhagen); *R. v. Unauthorised Reproduction of Telephone Directories* [2002] E.C.D.R. 3 BGH (Ger); *Nederlandse Omroep Stichting v. N.V. Holdingmaatschappij De Telegraaf* [2000] E.C.D.R. 129 HR (NL)

which make up the lists for those races which appear in the BHB database. It does not constitute investment in obtaining the contents of the database. It cannot, therefore, be taken into account in assessing whether the investment in the creation of the database was substantial⁶⁷.

Apart from the Database Directive, which was the first to introduce the 'non-commercial' exception in relation to teaching and scientific research, the next major development to affect HEIs and bring the provision of fair dealing in to the forefront in the UK, was the InfoSoc Directive 2001. This Directive was transposed into UK law in 2003 as the Copyright and Related Rights Regulations (Copyright Regulations 2003). The InfoSoc Directive was adopted by the European Council on 9th April 2001 and entered into force by the European Parliament on 22 June 2001. The main aims of the Directive were -

- (1) To harmonise rights in certain key areas of copyright throughout the EU;
- (2) To adapt legislation on copyright to meet the demands brought about by new technology, as in the form of the Internet and electronic commerce; and
- (3) Ratify the 1996 WIPO 'Internet Treaties' in the copyright field by implementing a number of obligations arising from the treaties.

To achieve these aims, the Directive provides for three exclusive rights. They are the reproduction right, communication to the public right and distribution right under Articles 2, 3 and 4 respectively⁶⁸. The Directive also provides for the protection of technical measures designed to prevent infringement of copyright under Article 6⁶⁹. Article 6 of the Directive as a whole deals with the provision of legal protection for technological measures used by right holders to protect their works against unauthorised reproduction and other copyright infringements. Section 296ZD(1) of the UK Copyright and Related Rights Regulations 2003 defines 'technological measures' as 'any technology, device or component which is intended, in the normal course of its operation, to protect work other than a computer program'.

⁶⁷ *British Horseracing Board Ltd and Others v. William Hill Organisation Ltd* [2005] E.W.C.A. Civ. 863 at p. 893.

⁶⁸ See Hart M., *The Copyright in the Information Society Directive: An Overview* [2002] *EIPR*, 58.

⁶⁹ Article 6, however, cannot apply to computer programs and Article 7.1(c) of Directive 91/250/EEC continues to have effect. The existing provision in the 1988 Act (s.296 as amended by SI 1992 No.3233) is therefore retained in respect of computer programs only.

Article 6 of the InfoSoc Directive is therefore further strengthened by Article 7 relating to digital rights management (DRM)⁷⁰, transposed to UK law, in the form of a new section 296ZE. One of the more renowned types of RMI is digital watermarking. Digital watermarking tracks readership in the course of digital use and serves as a tool for digital copyright protection and can also be used to indicate the ownership of the original work⁷¹. Watermarks essentially prevent and detect unauthorised reproductions and distributions. It must be noted that watermarking is essentially associated with authentication. The actual blocking of unauthorised copies is achieved through technologies like Serial Copy Management Systems (SCMS), which is used to prevent second generation copying of CDs.

There have been concerns expressed that the effect of Article 6 and proposed amendment to section 296 of the 1988 Act is effectively to shift copyright protection from law to technology⁷². Over and above this is a further concern – new laws which make circumvention of technological measures unlawful do not expire but can be replaced by more secure and advanced technology and therefore such technological measures may also be used to effectively extend the life of the copyright further than that offered by law, namely, life of the author plus 70 years. Whilst this is beneficial for the right holder, it clearly goes against the interest of the user and also against the balance that needs to be struck between the creator and user.

As far as the copyright exceptions are concerned, the InfoSoc Directive consists of one mandatory exception which must be implemented by all member states party to the InfoSoc Directive and twenty optional exceptions from which member states can pick and choose as they wish, i.e. member states can decide which exceptions to include and exclude from the given twenty. The mandatory exception under Article 5.1 is the exception to the reproduction right for certain temporary acts, which are transient or incidental. The twenty optional exceptions under Article 5.2-5.4 provide exceptions to the three exclusive rights noted above: the reproduction right, communication to the public right and distribution right. The InfoSoc Directive further specifies that it will be up to the individual member states to decide

⁷⁰ For more on RMI technologies, *also see*, Sellars C., Digital Rights Management Systems: Recent European Issues, [2003] 14(1) *Entertainment Law Review*, 5-9.

⁷¹ For further information on digital watermarking, *see*, Lai S., Digital Copyright and Watermarking [1999] *EIPR* 171.

⁷² *See*, Perritt J., Protecting Technology Over Copyright: A Step Too Far [2003] 14(1) *Entertainment Law Review*, 1-4.

whether to maintain or introduce exceptions in their national legislation in line with any one or more of such categories of exceptions. The list in Articles 5.2 and 5.3 is also exhaustive so that exceptions outside the scope of the specified categories are not permitted. Moreover, all exceptions must comply with the three-step test in Article 5.5 of the InfoSoc Directive⁷³.

One of the main aims of the InfoSoc Directive is to harmonise rights in certain key areas of copyright throughout the EU. However, the InfoSoc Directive appears to be a total failure in terms of harmonisation when reflecting on Articles 5.2-5.4 under which the exceptions are optional and does not oblige member states to implement the entire list but allows for them to pick and choose at will. As Michael Hart states⁷⁴, the InfoSoc Directive “should take the bull by the horns and harmonise mandatorily these exceptions in order both to guarantee them and to harmonise EU law”. Some tightening of the language may be needed in places, although certain of the more detailed aspects of implementing the exceptions could be left to the member states to take account of cultural differences. This raises the question whether the main weakness in relation to the exceptions arises as a result of the large number of exceptions leading to complete disharmony amongst member states in an area where harmonisation of the laws is absolutely essential? It is open to debate whether it would have been better to have ten mandatory exceptions under specific categories.

Copyright and Related Rights Regulations 2003: Impact on HEIs

The problem with ‘non-commercial’ research

A number of issues are apparent in the Copyright Regulations 2003 provisions, which amended sections 38, 39 and 43 (relating to copying of unpublished works) of the 1988 Act. Amended sections 37, 38 and 39 relate to copyright exceptions in the case of libraries and archives where the regulations now state that copying from such establishments is not an infringement if it is carried out for purposes of research for a non-commercial purpose.

⁷³The three-step-test basically prevents an overly broad interpretation of the explicit, existing exceptions and limitations. This test which initially appeared as Article 9(2) of the Berne Convention is also reflected in Article 13 of TRIPS and Article 10 of WCT. For a detailed explanation on the three-step-test, see Ricketson S., *The Three-step test, deemed quantities, libraries and closed exceptions - Advice prepared for the Centre for Copyright Studies Ltd* (New South Wales, Australia: Centre for Copyright Studies Ltd; 2002).

⁷⁴Hart M., *The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions* [1998] *EIPR* 169.

Section 61 relates to recording of folksongs and once again there is no infringement if such recording is done for purposes of research for a non-commercial purpose.

However, there is a definitional problem in relation to 'non-commercial'. The new regulations, keeping in step with Articles 5.2 – 5.5 of the Directive, also amend section 29 of the 1988 Act to incorporate the new 'non-commercial' provision. The provision amending s29 of 1988 Act reads as follows –

29.—(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a *non-commercial purpose* does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement (*emphasis added*).

Subsection (1A) of the proposed amendments was deleted and the following new subsections were added:

“(1B) No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.

(1C) Fair dealing with a literary, dramatic, musical or artistic work for *the purposes of private study* does not infringe any copyright in the work (*emphasis added*)”.

The new wording clearly complicates matters as it raises the issue of distinguishing between copying for private study or non-commercial research in contrast to research for commercial purposes. This distinction is commonly seen and used in patent laws. For example, the Patents Act 1977 (as amended)⁷⁵ sets out that a government department or an authorised person may carry out certain acts for the services of the Crown without the consent of the proprietor of the patent⁷⁶. Such permissible acts are set out under section 60(5) and include acts ‘(a) done privately and for purposes which are not commercial and if (b) it is done for experimental purposes relating to the subject-matter of the invention ...’⁷⁷. These sections provide that persons authorised to use a patent may include government contractors or

⁷⁵ Amendments to Patents Act 1977, up to and including 1 October 2005 at <http://www.patent.gov.uk/patent/legal/patact1977.htm> (last accessed 1 June 2006).

⁷⁶ *Ibid.*, Section 55(1).

⁷⁷ *Ibid.*, Section 60(5)(a), (b).

subcontractors when they are using the patent for or on behalf of the government to carry out experimental purposes.

The lack of clear guidelines, in patent and particularly copyright laws means that there is no way of knowing where the boundary between 'commercial' and 'non-commercial' copying of copyright work lies. It is the present opinion that whilst research for private study always bears the risk of turning in to a commercial exploitation, not all copying in commercial organisations can be described as commercial.

For instance, an individual employed by an educational establishment may commence research purely from an interest point of view and therefore any copying done by this individual would come under the new fair dealing exception of 'copying for a non-commercial purpose'. Once the research has been carried out, this individual may decide to write up a report/book about his research, which he then wishes to publish, which has a high potential of becoming extremely popular in the marketplace. A similar scenario was portrayed in the case of *Stephenson Jordan & Harrison Ltd. v. MacDonald & Evans*⁷⁸. In this case, Mr. Evans-Hemming worked as an employee for the plaintiff company Stephenson Jordan & Harrison Ltd. Whilst being employed, Mr. Evans-Hemming wrote a book setting out the principles of management engineering in which the plaintiff company was engaged in and also set out the 'know-how' involved in their application which was familiar only to skilled "management engineers" and their customers. The plaintiffs sued to restrain the publication of the book on the ground that it contained confidential information, which Mr. Evans-Hemming was not entitled to disclose. In presenting their allegation, the plaintiff company alleged that this case fell within the scope of section 5(1) of Copyright Act 1911, which stated that –

The author of a work shall be the first owner of the copyright therein: Provided that ... (b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall in the absence of any agreement to the contrary be the first owner of the copyright.

⁷⁸ [1952] R.P.C. 10.

It is therefore for the Court to determine the nature of the employment and whether the book (or if not the whole book, part of it) in the present case was within the sub-section, so that the copyright in the work belonged to the plaintiff company. The Court held in favour of the defendant, Mr. Evans-Hemming and established that the book did not disclose secret or confidential information and that the plaintiffs had the copyright of one section only and that an injunction confined to this section only should be granted.

On the other hand, commercial organisations engage in a mixture of copying for commercial purposes along with private research for study for professional qualifications or for employees' own personal current awareness. Therefore not all copying done within a commercial organisation can be described as commercial. Yet, it is appreciated that copying for private research for institutional chartership and study for professional qualifications, within a commercial organisation, may ultimately contribute towards the commercial success of the individual and ultimately the organisation. This argument is therefore valid only in circumstances where the employee has already secured a job in the field of his chosen career and the organisation he is working for has specifically agreed to pay the individual for any such examinations leading to professional qualifications. For example, an accountancy firm may pay the examination fee over and above an employee salary and also offer study leave to the employee to sit the Chartered Institute of Management Accountants (CIMA) examinations. It is agreed that in this case, the benefit to the individual and organisation has a very strong commercial slant.

On the contrary, where an individual employed by a small commercial organisation is attempting to further his knowledge and expertise by studying for professional qualifications, such as a degree in Master of Business Administration (MBA), which is paid by his salary, does he fall in to the same category as an individual doing research for a non-commercial purpose? To take the accountancy example again, an employee could be working for a stationery company, as a secretary, with the goal of becoming an accountant, within the accountancy department of that firm. The employee attends evening classes and as a possible future accountant, the firm gives the employee access to the accountancy department and hence, during his spare time he engages in copying journal articles and chapters from books for private study. According to the Regulations, it can be implied that such copying even though done within a commercial organisation would amount to non-commercial research.

Therefore, with non-commercial research having a commercial slant to it and vice-versa, distinguishing between copying for private study/research and research for commercial purposes becomes far more difficult under the 2003 Copyright Regulations⁷⁹. Libraries and Archives Copyright Alliance (LACA) carried out a survey in December 2002 to find out whether individuals would have problems distinguishing between research for a commercial purpose, research for a non-commercial purpose and private study. In the analysis, 43% said yes, 32% said no and 25% said it was not worth the trouble distinguishing. Thirty percent were of the view that non-commercial copying takes place for professional development purposes⁸⁰.

Analysis and Conclusion

With the InfoSoc Directive in force and with the new UK Copyright Regulations 2003 now in force, the time has come to look towards a solution for interpreting and distinguishing 'non-commercial'. One recommendation would be for a user to consider the *purpose* for which the research is undertaken. However, a better recommendation would be to consider the purpose for which the research is undertaken, '*at the time of carrying out the research*' (emphasis added). This will avoid confusion and take care of the situation where research primarily carried out for private study, ultimately turns in to a commercial exploitation.

However, even this recommendation can lead to complex consequences such as in the case of walk-in copying. The Copyright Regulations 2003 suggests that in the case of walk-in copying the onus lies on the user and it is the user who will have to make a decision as to the purpose of research and state whether the research is commercial or not. Whilst this 21st century improvement has come a long way it can still lead to problems. For example, it may lead to forms being completed improperly by users who may not be clear as to whether their research should fall in to the commercial/non-commercial category. It is also possible that individuals may attempt to evade paying the library fee and attempt to categorise their research as 'non-commercial'. This opens up a problem of enforcing copyright laws.

⁷⁹ See also, Norman S., *Copyright Adviser to CILIP* 'Copyright Consultation: Extracts from LACA Response: Regulatory Impact Assessment' (December 2002) *Managing Information* pp. 10-14.

⁸⁰ Norman S., *Copyright Adviser to CILIP* 'Copyright Consultation: Extracts from LACA Response: Regulatory Impact Assessment' (December 2002) *Managing Information* p. 12.

A mid-way solution to the situation in the UK can be found in Denmark. In Chapter 2 of the Consolidated Act on Copyright 2001, Denmark provides a solution, which could prove useful to the UK as well. Denmark makes a distinction between reproductions by business enterprises, alongside reproduction for private use; educational activities; archives, libraries and museums. A clear distinction is thus created between commercial and non-commercial copying and any gaps, which can lead to confusion removed. The Reproduction by Business Enterprises provision makes it clear what type of research in commercial organisations falls under the exception; for example –

...internal use for the purpose of their activities by photocopying etc. make or have copies made of descriptive articles in newspapers, magazines and collections, of brief excerpts of other published works of descriptive nature, and of illustrations reproduced in association with the text, provided the requirements regarding extended collective license according to section 50 have been met. Such copies may be used only for activities, which are covered by the agreement presumed in section 50⁸¹.

Perhaps the UK can also adopt a similar provision to avoid the present confusion. However, it must be borne in mind, as already set out in the preceding pages that during the passage of the 1988 Act, the UK strongly rejected the idea of including an exception for reproduction by commercial organisations. Time will tell whether the UK will change its mind.

⁸¹Section 14. To view the Consolidated Act on Copyright 2001, *see*, <http://www.kum.dk/sw4550.asp?usepf=true> (last accessed 10 August 2006).

PART B:
THE LAW, TECHNOLOGY AND HIGHER
EDUCATION INSTITUTIONS

**HIGHER EDUCATION INSTITUTIONS:
DEVELOPMENT AND EFFECT ON
COPYRIGHT LAW**

CHAPTER 3

HIGHER EDUCATION INSTITUTIONS: DEVELOPMENT AND EFFECT ON COPYRIGHT LAW

Introduction

Chapters one & two dealt with the historical and modern development of copyright and exceptions to copyright law respectively. Whilst both of these two chapters deal with the development of exceptions to copyright law, Chapter two in particular focused on the challenges faced by copyright law through technological developments such as the photocopy machine and computer, and the manner in which the law had to be adapted to deal with those developments. Further, Chapter two considered the manner in which modern copyright law applies to HEIs and identified, discussed and analysed the copyright exceptions.

The purpose of this chapter is to focus on HEIs and to assess the manner in which their development had an impact on copyright law. In particular, the question, which falls to be addressed in this chapter, is whether the rapid development of HEIs, especially in the 20th century, paved the way for piracy and infringement, similar to the effects experienced with the introduction of the printing press, photocopy boom, and the computer era. In examining the effect that the development of HEIs had on copyright law, this chapter contains a detailed examination of the development and functions of HEIs. As the impact of the development of HEIs on copyright law is one of the main themes of this study, an in-depth consideration of the development and functions of HEIs is considered highly relevant, without which the critique would be incomplete.

This chapter is written in two parts. Part I will deal with the two contrasting theories related to education: the theory of investment and the theory of consumption, as formulated by John Stuart Mill and John Maynard Keynes respectively. As the focus of this chapter is on HEIs, it is an appropriate starting point to consider these theories. If education is seen as an investment, then the Government will be more willing to inject money into the education system in view of a beneficial return in the long-term, when educated graduates re-inject money into public funds. However if education is viewed as purely consumptive, with no return, the Government will be less willing to fund HEIs.

Thereafter, the focus will move towards the development of HEIs within the UK and will consider the manner in which the 'ideal' of a university has changed: from an elitist institution to one of 'mass' education. In exploring *why* this change took place in the UK and *how* it took place, the Robbins Report on Higher Education, which brought about a significant expansion of universities in the 1960s, will be considered. The chapter will then move on to analyse whether such an expansion had an impact on copyright law.

Part II will deal with the question of copyright ownership within UK universities, as HEIs both use and create copyright material. In considering the 'ownership' question, reference will be made to a number of surveys carried out by Eizabeth Gadd, Charles Oppenheim and Steve Proberts. The main reason for this final analysis is to confirm and distinguish the role of copyright within HEIs in relation to use and ownership. In considering the issues raised in Part II, the chapter will attempt to answer the following questions: who owns the copyright in teaching and research material? Do academic authors as employees of HEIs have a right of ownership to the copyright in their research? These questions are directly related to one of the key questions of the thesis: are academic authors properly remunerated? It is necessary to know who owns the copyright in teaching and research material in order to address the issue of remuneration. It is essential to identify the different players involved, especially in research and academic writing, and to address the question of ownership in copyright before moving on to specifically question whether the academic author is properly remunerated.

PART ONE:

Education: Investment v. Consumption

***The theory of John Stuart Mill: education as 'investment'*¹**

John Stuart Mill (1806-1873) identified three main findings known as the 'well-behaved' profiles, which lie behind the theory of education as an investment. They are² –

¹ Cavenagh F. A., (ed.) *James and John Stuart Mill on Education* (London, New York, Toronto, Tokyo: Cambridge University Press; 1931), chapter 1.

² *Ibid.*

1. irrespective of the year of schooling or level of education attained, income increases with age up to a maximum point somewhere after forty and then levels off, or in some cases even declines;
2. the higher the educational attainment, the steeper the rise in earnings throughout the early phases of working life and usually although not invariably, the higher the starting salary; and
3. the higher the educational attainment, the later the year at which maximum earnings are reached and the higher retirement earnings.

These findings of John Stuart Mill suggest that within a few years of leaving school, better-educated people earn more than less-educated ones. Their advantage will increase with age and although they may lose some of the gain after reaching their earnings peak, the favourable differential persists until retirement. Also, it cannot be ignored that the better-educated are generally more flexible and more motivated, adapt themselves more easily to changing circumstances, benefit from work experience and training, act with greater initiative in problem-solving situations, and are more productive than the less-educated, even when their education has taught them no specific skills.

The rhetoric of Mill, at the inaugural address at St. Andrews University³ makes this point clear –

The proper function of an University in national education is tolerably well understood. At least there is a tolerably general agreement about what an University is not . . . What professional men should carry away with them from an University, is not professional knowledge, but that which should direct the use of their professional knowledge, and bring the light of general culture to illuminate the technicalities of a special pursuit. Men may be competent lawyers without general education, but it depends on general education to make them philosophic lawyers – who demand, and are capable of apprehending, principles, instead of merely cramming their memory with details. . . Education makes a man a more intelligent shoemaker, if that be his occupation, but not by teaching him how to make shoes; it does so by the mental exercises it gives, and the habits it impresses.

³ *Ibid.*, at pp. 133-135.

The above extract from Mill's inaugural speech supports the point that education of any kind – whether it be professional or clerical – ultimately, is an investment, as it will make each and every human being more intelligent and more useful to society. For the sake of clarity, Mill's argument can be further illustrated in practical economic terms. As Blaug states, economic growth is normally measured by the rates of increase of national income; national income, is by definition, the sum of all earned and unearned income in the economy. The extension of education tends to raise the earnings of those who have benefited from it and therefore investment in education accelerates economic growth⁴. The arguments of Mill, and the practical example proposed by Blaug, illustrate the theory of education as an investment in the future.

Keynesian Theory: education as 'consumption'⁵

During the 20th century, John Maynard Keynes (1883-1946) argued that education should be viewed as consumption. In arriving at this conclusion Keynes' main argument was that since expenditure on education is made by households, or by the government acting on behalf of households out of taxes collected from them, formal education is clearly consumptive. The Keynesian theory looks at investment and consumption as dependent upon the units being expended rather than the goods, being purchased. Therefore, according to the Keynesian theory, education is viewed as consumptive as it denotes those uses that are exhausted in the present calendar year. Keynes further explains his theory in the following manner –

Consumption is satisfied partly by objects produced currently and partly by objects produced previously i.e. by disinvestment. To the extent that consumption is satisfied by the latter there is a contradiction of current demand, since to that extent a part of current expenditure falls to find its way back as part of net income. Contrariwise whenever an object is produced within the period with a view to satisfying consumption subsequently, an expansion of current demand is set up . . . New capital investment can only take place in the excess of current capital disinvestment if future expenditure or consumption is expected to increase . . . We

⁴ Blaug M., *An Introduction to the Economics of Education* (London, Reading UK: The Penguin Press; 1970) at p. 61.

⁵ Keynes, J. M., *The General Theory of Employment, Interest, Money* (London: Macmillan for the Royal Economic Society; 1936) Book 3, chapters 8-10 'The propensity to consume'. Can also be found at <http://www.marxists.org/reference/subject/economics/keynes/general-theory/ch08.htm> (last accessed 15 June 2006).

are reminded of “The Fable of the Bees” – the gay of to-morrow are absolutely indispensable to provide a *raison d’être* for the grave of to-day⁶.

However, the Keynesian theory does not take in to account the contribution of education to economic growth. As argued by Mark Blaug above, as far as job training is concerned, education is seen as an investment because it is an expenditure incurred by business enterprises⁷. Furthermore, expenditure on education in the present will ultimately be an investment in relation to enhanced future output. To this extent, it can be considered as human capital:

Human capital is the present value of past investments in the skills of people, not the value of people themselves⁸.

In other words, people need to be educated to reap benefits in the future. As such, the maintenance and improvement of skills may be seen as an investment in human beings.

In most economies, education is looked upon as an investment and the arguments favouring education still stand strong⁹. Whilst this is true in many parts of the world, in the UK the ideal of education has undergone a change from a traditional and elitist system which existed many centuries ago to today’s system of mass education. In this sense, it is interesting to note that the above theories were presented in two different centuries, which saw a clear change in the education sector. Mill’s ‘education as investment’ argument was presented in the 19th century whilst Keynes put forward his theory of ‘education as consumption’ in the 20th century. It is the view of the writer that these two theories were most probably born out of a change in the structure of the UK higher education sector from an exclusive, elitist structure to a more people orientated, education structure. The relevance of these theories to the present discussion is as follows: the years following 1960 saw an increasing number of

⁶ *Ibid.*

⁷ *Op. cit.*, Blaug M., n. 4 at p. 19.

⁸ *Ibid.*, at p. 20.

⁹ <http://www.leeds.ac.uk/educol/ncihe/> (last accessed 15 June 2006).

students entering higher education. At that time, the Robbins Report on Higher Education questioned once again whether education was an investment¹⁰. The Committee answered –

Considered, therefore, as an investment, there seems a strong presumption in favour of a substantially increased expenditure on higher education¹¹.

As education has moved away from the confines of an elite group to educating a larger percentage of the British population, and has been confirmed as an investment in the 20th century, it is important to consider the knock-on effects that this can bring about. One such effect is the impact on copyright law, i.e. a larger number of universities and students inevitably leads to an increased use of photocopy machines and computers, which facilitate the reproduction of copyright works. Therefore, although it can be appreciated that education is an investment, it must also be highlighted that there can be a price attached to it – a cost which may have to be borne in part by the authors of creative works.

The next part of this chapter will trace the development of higher education in the UK whilst drawing attention to the effects, which this development had on copyright law. In tracing the development, the chapter will, primarily, identify the manner in which early HEIs known as ‘ancient universities’, evolved in the UK, before moving on to trace the development of the newer, so-called ‘red brick universities’.

The development and change in the ideal of a university

Every civilized society tends to develop institutions, which will enable it to acquire, digest, and advance knowledge relevant to the tasks, which it is thought, will confront it in the future. Of these institutions, the university is the most important¹².

- Sir Eric Ashby -

Tertiary education has an ancient and noble ancestry. The earliest institutions of this kind included the Academy of Socrates, a school dedicated to philosophical and scientific

¹⁰ Higher Education Report of the Committee appointed by the Prime Minister under the Chairmanship of Lord Robbins 1961-63 (London: Her Majesty's Stationery Office; 1963) Cmnd 2154.

¹¹ *Ibid.*, at p. 207, col. 630.

¹² Statement published by the University of Witwatersrand, found quoted in Perkins J.A., *The University in Transition* (Princeton, New Jersey: Princeton University Press; 1966) at pp. 3-4.

research, founded by Plato in Athens in 387 BC¹³, and the Library of Alexandria in Egypt founded at the beginning of the 3rd century BC during the reign of Ptolemy II of Egypt¹⁴. However as the German philosopher Karl Jasper so accurately describes it, it is the desire for knowledge and the determination to acquire it that takes one to the third level of education. 'It is here, with knowledge and with man's determination to acquire it, that we must begin'¹⁵. Knowledge acquired with determination and will must be transmitted and used, or it becomes sterile and dies. Hence, a university is seen to be the most appropriate medium for acquiring knowledge and creating channels to disseminate and pass on such knowledge on to society. The transmission of knowledge through teaching is seen as one of the oldest and most lasting of all purposes¹⁶.

As universities have grown in number and developed as academic institutions, the means by which they disseminate knowledge has changed. The change in teaching methods of HEIs from traditional classroom teaching to open universities in the 1960s, to the more recent and economically efficient distance learning in the digital environment in the 1990s has been especially pronounced. Hence, the face of universities changed in the mid-20th century as they began to cater for a larger percentage of the population as opposed to the narrower, elite market for which they catered during the 19th century. These institutions also began to thrive economically in the 20th century. For example, turnover in the higher education sector as a whole exceeds £10 billion per annum and an 'average university' will have a turnover in the region of £120-150 million¹⁷ – less than half of which comes directly from the state. More than half the funds come from a combination of international student fees, endowment income, intellectual property rights and competitively tendered research grants. In relation to

¹³ Facts found in 'Introduction to Plato's Republic: A Reader's Guide' at http://www.molloy.edu/academic/philosophy/sophia/plato/republic/repintro_comm.htm (last accessed 15 June 2006).

¹⁴ More about Library of Alexandria can be found at http://en.wikipedia.org/wiki/Library_of_Alexandria (last accessed 15 June 2006).

¹⁵ Embling J., *A fresh Look at Higher Education: European Implications of the Carnegie Commission Reports* (Amsterdam, London: Elsevier Scientific Publishing Company; 1974) at p. 7.

¹⁶ *Ibid.*, at p. 17.

¹⁷ Weedon Ralph, Policy Approaches to Copyright in HEIs: A Study for the JISC Committee on Awareness, Liaison and Training (JCALT), The Centre for Educational Systems, University of Strathclyde (2000) at [http://www.strath.ac.uk/ces/projects/jiscipr/RevFinal_and%20\(5\)JCALT.pdf](http://www.strath.ac.uk/ces/projects/jiscipr/RevFinal_and%20(5)JCALT.pdf) (last accessed 7 June 2005). This link is now not in use but a power point presentation of the above article can be found at <http://www.surf.nl/copyright/files/Ralph%20Weedon.ppt> (last accessed 15 June 2006).

the latter, HEIs have become increasingly interested in research work and have invested in specialised research centres attached to universities in order to carry out specialised research work. One of the best examples of this is the Roslin Institute where one of the most lucrative pieces of research work ever performed in Scotland was carried out¹⁸. Roslin Institute is an Associated Institution of Edinburgh University and was instrumental in the creation of the first cloned-mammal, Dolly the Sheep.

The early development of HEIs in UK

The introduction of tertiary education in the UK occurred well before the 19th century. At the turn of the 19th century, a university education was a privilege enjoyed almost exclusively by sons of the rich. Undergraduates made up less than 1% of the population and included only a handful of women. There were only a few universities in existence at the time including Oxford (founded in 1167); Cambridge (founded in 1209); St Andrews (founded in 1413); Glasgow (founded in 1451); Aberdeen (founded in 1495) and Edinburgh (founded in 1583) and these exclusive institutions became collectively known as the “ancient universities”. Throughout the years, the ideal of the university has changed and now over 30% of young people embark on some kind of higher education and over half of university students are women.

This change was triggered in part by the emergence of the so-called ‘Red Brick universities’, which were founded in the industrial cities of England in the latter years of the 19th century. Red Brick Universities was the original name used for six civic universities in Britain. They were so called because they were non-collegiate institutions, which admitted men without reference to religion or background and concentrated on ‘real world’ skills often linked to disciplines such as engineering. It is said that a professor of music at the University of Liverpool coined the actual name to describe these civic universities. His reference was inspired by the fact that the Victoria Building at the University of Liverpool was built from a distinctive red pressed brick, with terracotta decorative dressings¹⁹. The Red Brick universities included amongst others the universities of Manchester (established by bringing

¹⁸ Roslin Institute is one of the world’s leading centres for research on farm and other animals and is an Associated Institution of the University of Edinburgh. See Roslin Institute at <http://www.ri.bbsrc.ac.uk> (last accessed, 15 June 2006).

¹⁹ Information taken from <http://encyclopedia.thefreedictionary.com/British%20university> (last accessed, 15 June 2006).

together UMIST (1824) + Victoria University of Manchester (1851))²⁰, Sheffield (1828), Bristol (1876), Liverpool (1882) and Leeds (1904).

Some universities founded in the modern age have also been classed as 'Red Brick universities' although the modern classification remains imprecise. For example, the modern-day red brick universities include the University of Reading founded in the early 20th century as an extension college of the University of Oxford and which became a university in 1926; the University of Dundee which, after a seventy year relationship with the University of St. Andrews, became an independent university in 1967; the University of Exeter, originally an extension college of Cambridge University, and the University of Newcastle-upon-Tyne, originally a college of Durham University. This offers the impression of Red Brick universities being a 20th century 'extension' of the ancient universities which is incorrect. Red brick universities, or the civic universities, emerged during the 19th century and did not have a link or an 'extension' to the ancient universities; they were founded in their own right.

A question that can be raised here is, what is the main difference between ancient universities and Red Brick universities? The main difference is that whilst the Red Brick universities concentrated on 'real world' skills, the ancient universities focused on the liberal arts and imposed religious tests on students and staff; for example the assent to the Thirty-nine Articles which defined statements of Anglican doctrine. In other words, their respective education curricula differed significantly. The Red Brick universities in the UK represented a new era of education. It displayed a move away from the elitist system, which surrounded the ancient universities, and opened up the education sector to a wider group of people, resulting in an increase in knowledge in society.

As knowledge increased within Western society, high school education in the modern age became almost a necessity rather than a luxury. In 1968, the Carnegie Commission on Higher Education made this very clear by stating –

²⁰ Owens College, Manchester (now the University of Manchester) became the founding college of the federal Victoria University in 1880 and acquired university status in its own right when the federal university was dissolved in 1903.

At earlier stages in the nation's development, this role was chiefly the responsibility of the primary and secondary institutions. *Now as education through high school has become almost universal, as knowledge has increased, as the professional and intellectual demands of modern society have become ever more complex and exacting, the responsibility has shifted increasingly to . . . colleges and universities*²¹ (emphasis added).

Recognition of this fact has led to the expansion of universities throughout the world and especially within the UK. There were just 31 universities in the UK in 1963 when the Report of the Robbins Committee²² established the principle that anyone qualified to go to university was entitled to a place. This government-commissioned report looked into the future of higher education in the UK and since one aim of university reform was to provide greater breadth of study for more students, enrolments increased rapidly. A greater number of students within HEIs meant that there was a need for an increase in the volume of teaching and research materials available within these institutions. The existence of copying appliances such as contact photography and photocopying began to pose a serious threat to the existing copyright laws. The reason was because before these technological developments came into being, reproduction of copyright works, particularly, for those in educational establishments were limited to hand copying. However, with inventions such as the photocopying machine, the process was made easier and, importantly, cheaper. Students within HEIs had the opportunity of photocopying parts of books and journal articles, which meant that they did not have to purchase those books or hand copy information from those journal articles. Since students had increased in number within HEIs, the use of technological resources increased to match the student numbers. The end result was that the new opportunity of reproducing with ease was seen as a welcome development within the growing number of HEIs, which inevitably led to a flurry of copying, posing a threat to copyright laws.

So, whilst the expansion of higher education had positive effects leading to a more educated society, it has also paved the way for adverse consequences such as mass-copying of

²¹ Carnegie Commission on Higher Education, *Quality and Equality* (First Report), December 1968.

²² Report of the Robbins Committee 1963; the first principle of this report reads as follows – “*There should be maximum participation in initial higher education by young and mature students and in lifetime learning by adults, having regard to the needs of individuals, the nation and the future labour market. . .*”

materials. The UK began to face a pressing issue which needed to be addressed: the issue of reforming the existing copyright laws to meet technological advancements. The reform of copyright laws in the UK, led to the enactment of the Copyright Act 1911²³, which was followed by the more comprehensive and detailed Copyright Act 1956.

The 1960s: A significant change in the development of HEIs: Elite to mass education

About a decade after the coming into force of the Copyright Act 1956, the higher education sector experienced a 'boom' with a large number of HEIs being established in the 1960s. The 1960s saw nineteen universities introduced to accommodate the increasing student population. The terms 'New Universities' or 'Glass Plate Universities' are often used to refer to universities founded in the 1960s and thereafter; these include, amongst others, the Universities of East Anglia (1960), Essex (1965), Heriot-Watt (1966), Kent (1965), Keele (1962), Lancaster (1964), Stirling (1967), Strathclyde (1964), Sussex (1961), Warwick (1965) and York (1963). Although, the 1960s saw a significant increase in the number of universities in the Higher Education (hereinafter HE) sector, the term 'New University' is also used to describe any of the former polytechnics or colleges of higher and further education that were given the status of universities by John Major's government in 1992.

The expansion of HEIs followed a certain pattern especially in the second half of the 20th century. Enrolments expanded greatly to meet the demands of students wanting to enter higher education. In turn, the UK responded by expanding the numbers of institutions, creating new kinds of institutions, and generally becoming more concerned with educational planning²⁴. Whilst the 'ancient universities' of Oxford, Cambridge, St. Andrews, Glasgow, Aberdeen and Edinburgh were the traditional bastions of British HE, the newer institutions were responsible for much of the expansion, innovation, experimentation, and advanced work, especially commercialisation of research work in the HE sector in recent years. For example, amongst others, the University of Warwick is responsible for a large number of

²³ For more on *Copyright Act 1911*, see Chapter 2.

²⁴ See also, Mayhew Lewis B., *The Carnegie Commission on Higher Education* (San Francisco, Washington, London: Jossey-Bass Publishers; 1973), chapter 5, pp. 292- 294.

spin-off companies²⁵. The University of Warwick actively encourages anyone (generally academics) who may be interested in commercialising his or her research:

Welcome to Warwick Ventures. If you have selected this page, there is a good chance that you are an academic at Warwick, or elsewhere, and may already have a rough idea for a commercially viable business - typically, one borne out of your research. We exist to help support you maximise the potential of that idea²⁶.

It is correct to state that all universities whether 'ancient' or 'new' have contributed towards facilitating and enhancing education and knowledge within British society. Also, with more than 100 universities and more than 60 other institutions of higher education in the UK now, the British education system has gained a worldwide reputation. In parallel to this figure the total number of students in HE has also risen significantly from about 400,000 in 1965 to 2 million in 2004²⁷.

The question that falls to be considered at this point is the reasons for this massive increase in tertiary education. This part of the chapter will explore the main reasons which led to the pronounced change in the education system in the UK in the mid-20th century from elitist to mass education.

Reasons for change:

Robbins Report on Higher Education 1963²⁸

British definitions of human ability and of human educability have over the last century become progressively more generous, and comparisons of participation rates in England and Wales with Scotland, Northern Ireland and the Republic of Ireland . . . suggest that elitist assumptions about a strictly limited 'pool of ability' have proved to be false . . . It is worth recalling that the Robbins Report firmly

²⁵ http://www2.warwick.ac.uk/services/ventures/spin_off_companies/ Currently Warwick University has 18 spin-off companies (last accessed 15 June 2006).

²⁶ <http://www2.warwick.ac.uk/services/ventures/academics/> (last accessed 15 June 2006).

²⁷ Statistics taken from, Charter D. & Halpin T., Number of Universities set to double as Government opens door to private sector (July 17, 2004) at <http://www.timesonline.co.uk/article/0,2-1181860,00.html> (last accessed 15 June 2006).

²⁸ *Report of the Committee appointed by the Prime Minister under the Chairmanship of Lord Robbins 1961-1963* (London: HMSO; 1963), Cmnd 2154, including appendices I; IV of Cmnd 2154. *Also see*, Anderson D., Robbins Report on Higher Education (19 February 1964).

rejected the notion of a 'so-called pool of ability'. The Robbins Committee called for evidence on this topic from, among others, Jean Floud, a leading sociologist of education ... Floud concluded as follows: 'There is no iron law of the national intellect imposing an upper limit on the educational potential of the population. What only the few could do yesterday the many can do today ...'²⁹

This statement was made by the National Committee of Inquiry into Higher Education 1997³⁰ (Dearing Report) and refers to the conclusion reached by the Robbins Committee. One of the effects of the Robbins Report was the expansion of the breadth of HE to reach a larger number of people in the UK.

One of the main reasons for forming the Robbins Committee was to create a unified 'system' of HE in the UK. At the time the Committee was formed, in the UK, the three main sectors of education – the universities, the teacher training colleges and further education colleges – had all evolved separately and had nothing to do with each other. The role of speaking on behalf of these three sectors had gradually come to be occupied by the Committee of Vice-Chancellors and Principals (CVCP), founded after the First World War. The Robbins Committee recognised that the responsibilities of the Committee should be increased to include acting as a recipient for representations to the universities by those concerned with matters that impinge closely on the work of universities: the schools, the education departments and organisations representing other parts of the higher education system³¹.

It was also felt that a review of the education system was timely on financial grounds. In the 1960s the higher education sector was dependent on the Treasury for 88% of its total income, and about 90% of the student body received some measure of support from public funds, the two together representing a total of nearly £130 million³². It was also accepted by the Committee that the numbers in higher education had increased three-fold since 1938/39 from 69,000 to 216,000 but that entry standards, far from going down, had gone up and were still rising. Moreover, there were large and clearly identifiable reserves of intellectual

²⁹ The National Committee of Inquiry into Higher Education 1997 (Dearing Report) at http://www.leeds.ac.uk/educol/ncihe/r5_003.htm (last accessed 15 June 2006).

³⁰ *Ibid.*, chapter 4.28 – 4. 33.

³¹ Cmnd 2154, chapter XV, cols. 692-700.

³² Anderson D., *Robbins Report on Higher Education* (Association of Principals of Technical Institutions and Association of Technical Institutions) 19 February 1964, pp. 2-3.

ability. The Committee recommended that six new universities should be established, of which at least one should be in Scotland, and that possibly ten more universities should be formed by selecting and upgrading existing institutions such as large regional colleges, teacher training colleges, or in Scotland, central institutions³³.

These were the general ideas behind the recommendations by the Robbins Committee for proposing an expansion in the higher education sector. More specifically, the Robbins Report identified a number of factors as those which would enhance the economic future of the UK through higher education. These factors are set out below.

Implications for the economy and for society

The Robbins Committee suggested that the recommended expansion by them would bring with it an extensive transformation of the social and economic climate. They were of the view that expansion would lead to a change amongst those in the working population who had received higher education. The Robbins Committee illustrated their proposition with statistical projection³⁴.

If the proportions of students who successfully complete their courses remain constant, then the proportion of the working population who have completed full-time higher education will rise from 3.4% in 1960/1 to 6.2% by 1980/1. And even if there is no further increase in the percentage of the age group entering full-time education after 1980, it will go on increasing for some time afterwards and will reach 15% towards the end of the first quarter of the 21st century³⁵.

The Committee then addressed the issue of future needs. If a larger proportion of the population were to receive higher education, there would also be a need for their services. The Committee calculated the number of places that should be provided in higher education in terms of the demand for qualified applicants and made corresponding estimates of the eventual demand for their services. However, the Robbins Committee was aware of the limitations of this approach³⁶, for example, the fact that the model necessarily assumed the

³³ *Ibid.*, at pp. 9-10.

³⁴ Cmnd 2154, chapter VI, col. 182.

³⁵ *Ibid.*, col. 183.

³⁶ For further limitations, see, *ibid.*, col. 188.

present techniques of production. Although over short periods this may not have involved many inaccuracies, over ten to twenty years, it may well lead to a number of inaccuracies. In responding to these limitations, the Committee made it clear that the recommendations were likely to bring about many societal changes.

In justifying these changes, the Committee emphasised that education is a long-lived asset, in that an educated man will contribute more on account of his education, not just one year after his graduation, but for much of the rest of his life.

If a country doubled its expenditure on education in year t , the positive economic effects ought not to be looked for in year t 's GNP figures (which will actually be lower as the students who have worked are now in school), but in the figures for all the years from say, $t + 4$ on³⁷.

The Robbins Committee attempted to illustrate that although specific figures for the future could not be accurately established, general theory and logic implies that education is an investment. This is because education and advances in knowledge are usually regarded as the most important of the unspecified inputs³⁸. As such, input of education can lead to –

- (1) the 'personal profit orientation'; and
- (2) the 'national productivity orientation'³⁹.

The 'personal profit orientation' consists of looking at "differences in the net earnings of people with varying amounts of education as evidence of the amount of personal financial gain that can be associated with the attainment of a given level of education"⁴⁰. In contrast, the 'national productivity orientation' consists of looking at "education-related earnings differentials as partial evidence of the effects of education on the output of the country, and is based on the premise that in a market economy differences in earnings reflect differences

³⁷ Cmnd 2154, Appendix 4 – Part III, 'Assessing the Economic Contribution of Education: An Appraisal of Alternative Approaches', pp. 75-76, col. 13.

³⁸ *Ibid.*, Part III, p. 77, col 20.

³⁹ *Ibid.*, p. 80, col. 31.

⁴⁰ *Ibid.*, col. 32.

in productivity”⁴¹. This latter return is of much importance in relation to the economy and society. For example, in an economy where relative earnings are subject to the push and pull of market forces, it is natural to find relatively high earnings accruing to persons possessing special skills which enable them to make a greater economic contribution than the average person⁴².

The Robbins Committee also examined the investment and consumption theories of Mill and Keynes respectively and expressed the view that consumption and investment components of a person’s education are inextricably linked. They stressed that education confers long-lasting benefits of a consumption variety by extending the range of activities, which a person is able to enjoy during his leisure hours. “For many people education has no doubt awakened interests which have been a source of pleasure over an entire life time”⁴³. For example, a parent considering the cost of educating a promising child to be, let us say, a lawyer, may contrast the expense over the years of training with the probable yield estimated in terms of average income in that profession for an average expectation of life. The Committee clarified the present example, with a further explanation –

The general purport of our argument, however, should be clear enough. The immeasurable element in the return on suitable investment in higher education is positive. Therefore, even if it could be shown that the return on the volume contemplated in our recommendations, as measured by earnings differentials, was likely to fall below the general return on commercial investment – which we are inclined to doubt – there would still be this important element to be added in. The problem of allocating resources still remains and there are other forms of investment that also bring ‘external economies’. But there is, we submit, a presumption that the total amount can increase quite substantially in comparison with what has been spent hitherto without incurring discredit by comparison with ordinary commercial investment or with investment in most forms of nationalised industry⁴⁴.

Promoting an education system which was inclusive rather than exclusive led to beneficial consequences. It generated success and more income within society and within the economy.

⁴¹ *Ibid.*, col. 33.

⁴² *Ibid.*, p. 83, col. 41.

⁴³ *Ibid.*, pp. 87-89, cols. 58-66.

⁴⁴ Cmnd 2154, chapter XIV, col. 628.

However, thirty years after the Robbins Committee was established, the need to review the education sector was once again seen as essential and in 1997, the Report of the National Committee⁴⁵ (the Dearing Report) was produced.

The Dearing Committee attempted to build upon the strong foundations laid by the Robbins Committee to adapt the higher education sector to suit modern times. It, amongst other things, identified three main reasons for a review of the higher education system in the 1990s. They were:

1. increasing economic integration across the world;
2. a transformed labour market; and
3. changing structure of the economy.

A brief look at the Dearing Report 1997

Increasing economic integration across the world⁴⁶

The Dearing Committee set out of a number of economic changes, which it considered had had an impact on HEIs. For example, the Committee stated that high quality, relevant higher education provision was a key factor in attracting and anchoring the operations of global corporations because of the research capabilities of institutions, and the skills and knowledge which would be developed in the local workforce. In addition to a well-educated, highly skilled workforce⁴⁷, a further prerequisite for an educated society as identified by the Committee was a research base to provide new knowledge, understanding and ideas. The Committee went on to emphasise that this factor will lead technology companies to locate in countries which have a good supply of trained researchers; which can apply the fruits of research; and which offer opportunities to companies for communication and collaboration with those involved in basic research⁴⁸.

⁴⁵ *Op. cit.*, n. 29 at <http://www.leeds.ac.uk/educol/ncihe/> chapter 4, para. 4.15. (last accessed 15 June 2006).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, at chapter 4.14.

⁴⁸ *Ibid.*

A transformed labour market⁴⁹

The years 1963-1997 saw the labour market undergo radical change. Driven by continuing change in industry and commerce, there was further development of what came to be known as 'portfolio careers', i.e. where people change direction in the course of their working life. To survive in the labour market, employees realised the need to renew sets of skills, to work across conventional boundaries and to see connections between processes, functions and disciplines and, in particular, to manage the learning which will support their careers. Hence, these factors contributed towards the change in education systems in the past few decades and affected the trend in future education.

Around that time, the UK realised the importance of continuing education and the need for flexibility. Furthermore, coupled with the previously discussed 'increasing economic integration across the world', UK citizens became aware of opportunities, which lay across their national borders, especially in Australia, New Zealand, USA, South Africa, Canada and closer to home in Europe with the free movement of persons, labour etc. Operating on a 'points system' these countries stated that if an individual, a couple or a family intended to relocate to one of the identified countries permanently, they could do so on condition that they had enough points to qualify under the Independent/Skilled Worker category points system. Factors such as qualifications, work experience, occupation and age were assessed for the points system. The 'General Occupation List' set out a points weighting for occupations that were in particular demand in these countries. In order to emigrate to any of the above countries, the Four Corners Eligibility Assessment Service⁵⁰ made it possible for an individual to find out whether he/she had the potential to meet the current criteria. It was clear that the invitation to widen horizons was truly based on qualifications, work experience and occupation – all of which made education at tertiary level leading to an occupation a necessity in order to contemplate job security for the emigration process.

⁴⁹ *Ibid.*, at chapter 4.16.

⁵⁰ http://www.4-corners.com/about_us.php This information relating to emigration is provided by the writer and does not form part of the Dearing Report (last accessed 15 June 2006).

Changing structure of the economy⁵¹

During the 1970s and 1980s the traditional economies in the UK declined. Industries such as textiles, heavy engineering, shipbuilding, coal mining and machine tools all declined with international economic change. With this decline came marked unemployment. However, at the same time, the influence of competition in the global economy led to great advances in productivity. The traditional industries were then increasingly replaced by industries such as pharmaceuticals, IT, biotechnology, communications and semi-conductors. For example, 40% of European manufacture of personal computers was carried out in UK during this period of time.

In this new, exciting but challenging environment, for many employers creativity, design, research, development, engineering, marketing and organisational skills mattered at least as much as the content of knowledge. For higher education, this presented particular challenges. To be able to work closely with industry and to ensure that graduates could contribute effectively, the conventional organisation of knowledge and teaching in major areas needed transformation⁵². Activities which cross traditional boundaries became more important. Institutions needed to be more flexible in the way they organised their resources and in their organisational structures⁵³. Programmes were needed to give students the opportunities and skills to work across disciplines and to develop generic or transferable skills, which were valuable in many different contexts⁵⁴. It was important for higher education to respond and develop in this way, for if not, it was inevitable that alternative centres of research and advice would gain in strength at higher education's expense.

Analysis

Focusing on the three factors discussed above it can be said that they have illustrated the following points – the importance of continuing education, the importance of education as a tool for adaptation, the need for education across the traditional boundaries, and the need for graduates to be flexible. In analysing these points the writer is of the opinion that with rapid economic growth, more jobs became available and to meet the demand generated by the

⁵¹ *Op. cit.*, n. 29 at chapter 4.28 – 4. 33.

⁵² *Ibid.*, at chapter 4.32.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

labour market, HEIs provided the requisite supply of increased education. This system worked effectively until the supply (education) extended the demand (jobs). Once the demand for graduates in the labour market began to decline, the situation became ineffective, as is the case now. Put simply, there are more graduates than jobs.

Further evidence on this issue can be drawn from the Organisation for Economic Co-operation and Development (OECD)⁵⁵, which reveal that due to the mass system of higher education in the modern era, universities are under pressure to accommodate, as well as educate, many more students each and every year. The problem seems to arise *after* the student has been educated at tertiary level and when looking for job opportunities. In an ideal world, people could acquire extra education only when the job opportunities and the associated lifetime income stream that they are expected to generate outweigh the value of the time and resources that will have to be invested, due allowance being made for the fact that income foregone in the present is worth more than equivalent income accruing in the future⁵⁶. However, what happens when the value of the time and resources invested in higher education outweigh the job opportunities and the associated lifetime income streams that it is expected to create? It can have a negative impact on the economy and create unrest amongst graduates who have been unable to fulfil their potential.

Whilst universities were expanding in the UK and beginning to embrace technological developments, intellectual property laws, in particular, copyright law, were being challenged and HEIs became increasingly concerned about the ownership of intellectual property rights, raising issues such as who owned the copyright to teaching material, literary research, or whether particular pieces of research be patented etc. The expansion of HEIs challenged copyright law in different ways. The expansion in student numbers meant an expansion and increase in technological resources leading to potential for piracy as more and more academics became aware of the intellectual property rights attached to their teaching and research material. One of the questions frequently asked during the 1970s was, who owned the copyright in research material? Was it the academic author or the employer (HEI)? The expansion of technology and HEIs led to the creation of Copyright Collecting Societies focused mainly on HEI users as noted above in Chapter 2.

⁵⁵ OECD, Education at a Glance 2004 at http://www.oecd.org/document/7/0,2340,en_2649_201185_33712135_1_1_1_1,00.html (last accessed 15 June 2006).

⁵⁶ *Op. cit.*, n. 29 at chapter 4.32.

For a collecting society to properly distribute the monies it collects it must know who owns the copyright in the work – is it the author, publisher or the HEI as the employer? The next part of this chapter will explore this issue and attempt to ascertain ‘who’ is the owner of copyright in an academic setting, given that there are a number of possible players vying for the pole position: is it the HEI as employer, the academic author as the employee or the publisher to whom the copyright may have been assigned?

PART TWO:

Copyright policies within HEIs

The two central pillars of HEIs: teaching and research

The mission statement of the *Constitution of the School of Law, University of Edinburgh* as adopted in June 2003 states that –

The purposes[s] [sic] of the School of Law is the *teaching* of and *research* in and about law and legal institutions, in particular the law and legal institutions of Scotland, in an international context and to the highest academic standards (*emphasis added*)⁵⁷.

The Mission Statement is supported by a set of objectives:

- To pursue the *mutually supportive activities of research, teaching and learning* in ways which are assessed as excellent by academic peers, students and professional lawyers;
- To act as an agent for the *diffusion of ideas, concepts, theories, innovations and expertise* relevant to the study and practice of law;
- To *use the results of research* to provide a *firmly grounded and monitored teaching programme* which prepares students for their professional careers in or outwith the legal profession; and
- To *disseminate knowledge and skills* as widely as possible to undergraduates, postgraduates and (through extra-mural and continuing education) to professionals and the public⁵⁸.

⁵⁷http://www.law.ed.ac.uk/docs/262_constitution.doc (last accessed 15 June 2006).

⁵⁸ *Ibid.*

This is a clear indication of the importance of the two main functions of teaching and research within an academic institution. These two central pillars of academia are used to 'diffuse' and 'disseminate' ideas, concepts, theories, innovations, knowledge and skills to students, professionals and eventually to the public at large.

These two functions of HEIs have always gone hand in hand, although research has carried with it an economic importance due to the generation of income and public financing attached to it. For example, in the present day, the quality of a university is judged by applying the standards of the Research Assessment Exercise (RAE) and not through teaching *per se*. The RAE assesses the quality of research in universities and colleges in the UK. It takes place every five to six years. The main purpose of the Research Assessment Exercise (RAE) is to enable the higher education funding bodies to distribute public funds for research selectively on the basis of quality. This means that institutions conducting the best research receive a larger proportion of the available grant, so that the infrastructure for the top level of research in the UK is protected and developed. Around £5 billion of research funds were distributed in response to the results of the 2001 RAE⁵⁹.

Research in higher education creates the all-important natural research base, which generates much of the basic and strategic research for developments which are directly useful to industry, public services and commerce. Of course, it must be pointed out that research is not unique to HEIs alone; intensive research is carried out within spin-off companies or associated institutions such as the Roslin Institute as indicated above, in pharmaceutical industries for the advancement of medicines, and in aerospace companies such as the Society of British Aerospace Companies (SBAC)⁶⁰ for the advancement of travel. However, HEIs have always remained pre-eminent institutions for research as they encompass varieties of research ranging from, amongst others, medicine, science and technology to social sciences and humanities. Recognising the strength of research within both HEIs and industry has

⁵⁹ RAE website at <http://www.rae.ac.uk/> (last accessed 15 June 2006).

⁶⁰ SBAC at <http://www.sbac.co.uk/> (last accessed, 15 June 2006). SBAC is the UK's national trade association representing companies supplying civil air transport, aerospace defence, homeland security and space. SBAC encompasses the British Airports Group and the United Kingdom Industrial Space Committee. It represents over 1500 member companies, assisting them in developing new business globally, facilitates innovation and competitiveness and provides regulatory services in technical standards and accreditation.

assisted the flow of new knowledge to become increasingly a two-way process with the term 'knowledge transfer' being increasingly preferred to 'technology transfer'⁶¹.

The teaching function plays an increasingly important role as a generator of foreign exchange earnings. The UK remains one of the most popular destinations for overseas students who bring with them not just the fees they pay to HEIs but spending power used in the UK economy. Recent estimates suggest spending power of foreign nationals in the UK exceeds £1 billion⁶². During the past couple of decades, both teaching and research in UK higher education has contributed materially to the nation's wealth-creating capacity. However, these benefits do not arise only by attracting students to UK. There is now an even greater potential for selling UK higher education overseas, especially degrees by research, through the use of new communication and information technologies. For example, the AHRC Centre for Studies in Intellectual Property and IT Law at the University of Edinburgh offers a LL.M. in Innovation, Technology and the Law through distance learning⁶³. A further advantage of this system is that as technologies continue to develop, the range of services which can be offered will increase whilst the accessibility, flexibility and costs will decrease.

It is apparent that the two main pillars of HEIs greatly enrich teaching, scholarship and research in the UK. Those involved in education, in particular, higher education bring valuable alternative perspectives and experiences to the education process and to the social and cultural life of society. Involving the best minds and the greatest breadth of experience from across the world enhances the quality of teaching and research in UK, making both of these central pillars of teaching and research within HEIs in UK extremely valuable.

The rest of this Chapter will focus on the central pillar of research and specifically question the ownership of copyright in research material. The introduction to the thesis explained the significance of exploring both these strands, as they are two functions central to the Copyright Licensing Agency (CLA). CLA is committed to remunerate authors, publishers and artists for their creative works, although its commitment towards remunerating academic

⁶¹ *Op. cit.*, n. 28 Report of the Robbins Committee 1963, chapter 5.

⁶² *Ibid.*

⁶³ See, <http://www.law.ed.ac.uk/ahrb/distancelearning/INDEX.Asp> (last accessed 15 June 2006).

authors has been questioned. Chapter 6 will carry out an in-depth study into the operational functions of CLA and attempt to answer whether CLA remunerates authors, publishers and artists fairly. However, before this question can be addressed it is important to consider the 'ownership' of copyright work in an academic setting and consider *who* owns the copyright to research material such as journal articles, before attempting to answer *who* should be remunerated for it. The ownership of copyright has generated debates about the rights of the author and the publisher, with the employer having being largely ignored, even though in an academic context, the employer is a key player. The aim of this part of the chapter is to focus on the ignored player – the employer – and the academic author in the copyright ownership debate.

At a conference at the University of Edinburgh in 2004⁶⁴, it was agreed that the purpose of HEIs "was to produce top quality research and well educated graduates through a developed system that supported the teaching and learning process"⁶⁵. As J. Embling says, "the transmission of knowledge, the teaching function, was still important but it was the extension and refining of the heritage which was the basis of success and prestige"⁶⁶. At present, "the extension and refining of the heritage" is particularly enhanced through new technologies and developments, which assist in the dissemination and diffusion of knowledge.

⁶⁴ IP Free World in Higher Education Institutions, Playfair Library Hall, University of Edinburgh, 16-17 September 2004.

⁶⁵ See, edited minutes of the above conference at <http://www.law.ed.ac.uk/ahrb/publications/online/ipfreeworld.pdf> p. 3 of 12 (last accessed 15 June 2006).

⁶⁶ *Op. cit.*, Embling J., n. 15 at p. 11.

Ownership of copyright in research materials I:

Employer HEI v. Employee Academic Author

In the UK, the position in relation to the ownership of copyright in academic papers and research carried out by employees within HEIs remains ambiguous. On the one hand, the law, as set out in section 11(2) of the 1988 Act, states that:

Where a literary, dramatic, musical or artistic work is *made by an employee in the course of his employment, his employer is the first owner of any copyright* in the work subject to any agreement to the contrary (*emphasis added*).

In the UK, the application of this clause to HEIs is unclear. For example it could be argued that if an academic's employment contract does not explicitly state that his or her job is to undertake research, any research he or she performs is not done 'in the course of employment'. However, on the other hand, if research were performed during the employer's time and using the employer's facilities, then the copyright would belong to the employer, regardless of the contract⁶⁷ in accordance with section 11(2) of the 1988 Act. An example, to illustrate the present argument can be drawn from the case of *Stephenson Jordan & Harrison Ltd. v. MacDonald & Evans*⁶⁸, discussed in Chapter 2⁶⁹. This case illustrates the problems that employees could be faced with as a result of the vague wording of section 5(1) of Copyright Act 1911. It is disappointing to note that the Copyright Acts 1956 and 1988 have re-stated almost similar wording to the Copyright Act 1911, thereby leaving the onus of determining ownership of copyright in the hands of the judiciary⁷⁰. However, interestingly, Charles Oppenheim, in the Rights Metadata for Open Archiving Study (RoMEO study) on 'The Impact of Copyright Ownership on Academic Author Self-Archiving'⁷¹ argues that an academic produces research publications as part of his or her employee duties, and that a

⁶⁷ See, Bok D., *Universities in the Marketplace: The Commercialization of Higher Education* (New Jersey, Oxfordshire: Princeton University Press; 2003), chapter 5 on 'Education'.

⁶⁸ [1952] R.P.C. 10.

⁶⁹ See Chapter 2, pp. 74-75.

⁷⁰ For the wording in CDPA 1988, section 11(2), see above, p. 61.

⁷¹ Gadd Elizabeth, Oppenheim Charles, Proberts Steve, RoMEO Studies I: The Impact of Copyright Ownership on Academic Author Self-Archiving, (2003) 59(3) *Journal of Documentation*, pp. 243-277.

strong case can be made that the HEI owns the copyright in such publications automatically, unless there is a contract to the contrary. The RoMEO project was funded by the Joint Information Systems Committee (JISC) and was set up to investigate IPR issues relating to academic author self-archiving of research papers⁷².

In response, it must be pointed out that in practice, academic research is often done partially using the employer's facilities and sometimes with the aid of external funding and external resources. For example, extensive research into the field of Intellectual Property and IT law at the University of Edinburgh is carried out with the aid of funding received from the Arts and Humanities Research Council (AHRC), an independent Non-Departmental Public Body (NDPB), established by Royal Charter and accountable to Parliament through the DTI's Office of Science and Technology. The research produced within the AHRC Research Centre for Studies in Intellectual Property and IT Law at the University of Edinburgh, therefore, is carried out with the aid of the AHRC funding which has been applied for and been awarded to the University. In this situation, although the academic carries out research as part of his or her employment duties, should copyright in any material created not rightfully belong to the employee or maybe even the funder?

The ambiguity pertaining to ownership of research has been dealt with in the US. US copyright law initially introduced the principle of a 'work made-for-hire' in their Copyright Act 1909⁷³. According to the current US Copyright Act 1976 a 'work made-for-hire' is an exception to the general copyright rule that the person who creates a work is the author of that work. According to this exception, if a work is made-for-hire, the employer and not the employee is considered the author. The employer can be an organisation, a firm or an individual⁷⁴.

The 'work-made-for-hire' provisions of the US Copyright Act 1976, Title 17, US Copyright Code, §201(b) reads as follows:

⁷² For more about the RoMEO Project, see <http://www.lboro.ac.uk/departments/dis/disresearch/romeo/Romeo%20Home%20Text.htm> (last accessed, 15 June 2006).

⁷³ Monotti A., & Ricketson S., *Universities and IP: Ownership and Exploitation* (Oxford, New York: Oxford University Press; 2003), pp. 278-283.

⁷⁴ For more information about work made-for-hire, see also, US Copyright Office, 'Works Made for Hire under the 1976 Copyright Act' at <http://www.copyright.gov/circs/circ09.pdf> (last accessed 15 June 2006).

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

As such, Title 17, US Copyright Code, §201(b) is the US equivalent to the UK section 11(2) of the 1988 Act. However, the US law is arguably clearer. The US Copyright Act 1976, Title 17, US Copyright Code § 101 defines ‘work made-for-hire’ as follows –

1. a work prepared by an employee within the scope of her employment; *or*
2. a work specially ordered by an employee or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence ... an ‘instructional text’ is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities⁷⁵.

Some authors strongly argue that HEIs have some legitimate claims on faculty members’ work under the ‘work-for-hire’ doctrine. Work that is assigned directly by the university to a faculty member will be categorised as ‘work-for-hire’. Thus, when a faculty administrator creates a policy statement, the university owns that statement. Research seems to be the intellectual property of the faculty, at least whenever such research is initiated and undertaken autonomously by the faculty member⁷⁶.

At the time the work-for-hire doctrine was introduced by the US Copyright Act 1909, an exception known as the ‘teacher exception’ also existed under the same statute. The ‘teacher exception’ allowed a University faculty member to retain copyright in his or her research. However, the failure to exclude faculty academic writings from the definition of ‘works for hire’ caused many commentators to assume that the 1976 Act abolished the ‘teacher

⁷⁵ *Ibid.*

⁷⁶ *Op. cit.*, Monotti A., & Ricketson S., n. 73 at pp. 279-280.

exception'⁷⁷. The current position in the US is that a written agreement is necessary to alter the application of the 'work-for-hire' clause. This is because there is no express 'teacher exception' clause and there are no cases which refer directly to its use in determining copyright ownership under the 1976 Act. For example, in the case of *The University of Colorado Foundation, Inc. v. American Cyanamid*⁷⁸ it was held that a research article is a 'work-made-for-hire', and the copyright therefore belongs to the university that employed the professor who wrote the article. In the same manner, in the case of *Manning v. Board of Trustees of Community College District*⁷⁹ No. 505 (Parkland College), it was held that the work of a staff photographer belonged to the college under the 'work-made-for-hire' doctrine. Therefore, the 'teachers' exception' argument has not always been successful and the more recent case law does not make mention of it⁸⁰. The last time a case was decided in favour of an academic was in 1987 in *Weinstein v. University of Illinois*⁸¹ where the court held that the faculty member retained the copyright in the research article. In the UK, the lack of clear definitions in the relevant statute has left this issue mainly in the hands of the judiciary.

Ownership of copyright in research materials II:

Practice v. Custom

Whilst there has been an on-going debate about 'who' owns the copyright in research material in the UK, as set out above, it is interesting to note that as a matter of custom, many HEIs have employed a practice of waiving any rights of ownership of copyright, particularly in research material⁸². One of the reasons for this as identified by the AAU Task Force of USA is because both faculty members and HEIs regard most research as having no direct market value except where patents may be involved⁸³.

⁷⁷ *Ibid.*

⁷⁸ 880 F. Supp. 1387 (D. Colo. 1995).

⁷⁹ 109 F. Supp. 2d 976 (C.D. Ill. 2000).

⁸⁰ In this regard, see also, http://www.copyright.iupui.edu/dl_faq.htm (last accessed 15 June 2006).

⁸¹ 811 F.2d 1091 (7th Circuit, 1987).

⁸² *Op. cit.*, Monotti A., & Ricketson S., n. 73, chapter 6, 'scholarly articles and other research material', pp. 273-274.

⁸³ Report of the Association of American Universities (AAU) Task Force on Intellectual Property Rights in an Electronic Environment, Submitted to the AAU Presidents Steering Committee, April 4 1994 at <http://www.ifla.org/documents/infopol/copyright/intllpty.txt> (last accessed 15 June 2006).

A report in the UK also considered the reasons for the lack of interest in ownership of copyright in teaching and research material⁸⁴. It is arguably ironic that HEIs should follow this custom of waiving rights of ownership of copyright in scholarly work in the information age where intellectual property rights are valued so highly. Universities have begun to realise that in a global marketplace, the teaching and learning materials currently offered within their own institutions could well be exploited externally. The development of the e-university has further fuelled universities' anxieties to protect and exploit this previously overlooked portion of intellectual property rights. In view of this, the Higher Education Funding Council for England (HEFCE), Universities UK (UUK) and Standing Conference of Principals (SCOP)⁸⁵ established a working group to consider the best way of managing these rights. The working group report recommended that the HEIs own intellectual property rights in e-learning materials, but staff have a royalty-free license to use it within the HEI. It provides model contract clauses, which Universities can use and provides advice on how to manage rights transfer when staff leaves⁸⁶.

In 2000, the UK JISC Committee for Awareness, Liaison and Training (JCALT) carried out a survey to determine whether HEIs in the UK actually do waive their copyright in research material. The study was entitled *Policy Approaches to Copyright in HEIs*⁸⁷. In this study, sixty-six HEIs were presented with the same question: 'Does your institution waive copyright on any in the list below [sic]?' The findings returned that those who waived some of their control, waived copyright on journal articles and books (80%), closely followed by

⁸⁴ Dearing Report 1997. See *op. cit.*, n. 29 at http://www.leeds.ac.uk/educol/ncihe/r5_003.htm (last accessed 15 June 2006). Also see, Gadd E., Oppenheim C. Proberts S., RoMEO Studies 1: The Impact of Copyright Ownership on Academic Author Self-Archiving, (2003) 59(3) *Journal of Documentation*, pp. 243-277.

⁸⁵ SCOP aims to promote the colleges within British HE and comprises heads of publicly designated colleges and institutions of HE in England and Northern Ireland. For more information, see SCOP website at <http://www.scop.ac.uk/Scop.asp> (last accessed 15 June 2006).

⁸⁶ Higher Education Funding Council for England, *Intellectual Property Rights in e-learning Programmes* at http://www.hefce.ac.uk/Pubs/HEFCE/2003/03_08.htm (last accessed 20 July 2006).

⁸⁷ Weedon R., *Policy Approaches to Copyright in HEIs: A Study for the JISC Committee on Awareness, Liaison and Training (JCALT)*, The Centre for Educational Systems, University of Strathclyde (2000) at [http://www.strath.ac.uk/ces/projects/jiscipr/RevFinal_amd%20\(5\)JCALT.pdf](http://www.strath.ac.uk/ces/projects/jiscipr/RevFinal_amd%20(5)JCALT.pdf) (last accessed 7 June 2005). This link is now not in use but a power point presentation of the above article can be found at <http://www.surf.nl/copyright/files/Ralph%20Weedon.ppt> (last accessed 15 June 2006). See also, Law D.G., Weedon R.L., Sheen M.R., *Universities and article copyright*, (2000) 13 *Learned Publishing*, pp. 141-150.

personal lecture notes (73%). The survey then asked the HEIs to submit their institutional copyright policies for analysis. Of the sixty-six which were surveyed, only thirty-six did so, thus confirming that “most institutions do waive rights towards scholarly work, with just over half the sample (53%) acknowledging this in the documentation they sent in”⁸⁸. In response to the findings, the study further commented that, “it is likely that in other cases rights are effectively waived by custom and practice”⁸⁹.

Further, in 2002 the Association of Learned and Professional Society Publishers (ALPSP)⁹⁰ published a report called *Authors and Electronic Publishing*. In this report they asked academics if they owned the copyright in research papers. 79% of academics said that they thought it was the author who owned the copyright whilst 17% said their institution or company owned it and 4% said the matter was disputed. This shows that whilst a large proportion of academics believe that they own the copyright in their work, there still remains some doubt as to the ownership of copyright. The situation could, and would, be clearer if the employment contracts of academics made a specific provision for the ownership of copyright; in light of the above statistics, this does not appear to be the custom in UK HEIs. If the norm in UK HEIs is that such provision is not made, does this mean that the HEI has the right to ownership of copyright in the case of a dispute?⁹¹

In the RoMEO study carried out by Gadd, Oppenheim and Probet⁹² the following question was asked: ‘At your institution who owns the copyright in your research papers?’ The following findings were returned.

⁸⁸ *Ibid.*, at p. 55.

⁸⁹ *Ibid.*

⁹⁰ See ALPSP at <http://www.alpsp.org/default.htm> (last accessed 15 June 2006).

⁹¹ See *op. cit.*, Monotti A. & Ricketson S., n. 73 at chapter 9.

⁹² *Op. cit.*, Gadd, Oppenheim and Probets, n. 71.

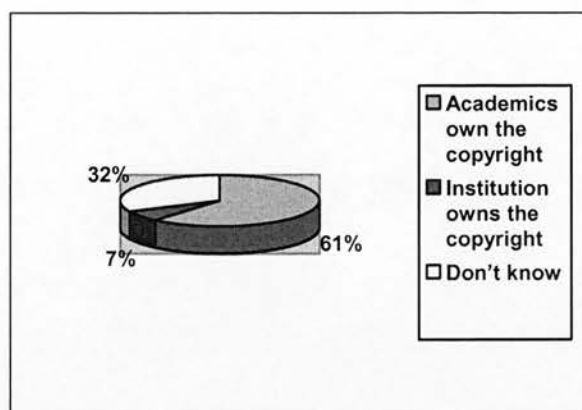


Figure 1 - Statistics taken from Gadd, Oppenheim & Proberts

The survey found that 1/3 of academics did not know who owned the copyright in their research papers. The majority (61%) believed that academics owned the copyright in their research papers whilst 7% thought that the institution owned it. The statistics illustrate that the law in the UK, i.e. section 11(2) of the 1988 Act, is unclear and the customs and practice adopted by HEIs vary significantly leading to inevitable confusion between the HEIs and their employee academics as to the ownership of copyright.

Ralph Weedon's survey in 2000⁹³ posed further questions on a range of academics by telephone interview. The response was as follows –

Most admitted to never having really considered this issue. Indeed, when asked about research papers being written up for publication, many could not relate to this question at all, thinking that it related to the transfer of ownership between the academic and the publisher. Similarly, most were amazed to learn that their institution might have legal ownership of their work. None however, were particularly upset by this revelation and none had any idea of whether their institution officially waived these rights⁹⁴.

So, why is there a lack of a formal copyright policy within HEIs? For example, the survey carried out by JCALT revealed that half of the universities surveyed did not have a formal policy in place. The main reason for the lack of formal policy and for the lack of interest

⁹³ *Op. cit.*, Weedon R., n. 87.

⁹⁴ *Ibid.*

stems from the fact, as already identified, that most research within HEIs, which may be the subject of a copyright claim, has no direct market value. Also, as academics are expected to 'win' research funding and to publish in scholarly journals, it is a logical assumption that they would have to assign copyright to those journals if asked. Any attempts to retain the copyright in such circumstances would be futile for their future academic career. If this is the case, it is neither the HEI nor the academic who retains the copyright, but the publisher.

In ascertaining the position in relation to the assigning of copyright to the journal/publisher, a 1999 ALPSP survey entitled 'What Authors Want' showed that 61% of respondents thought that copyright should remain with the author, rather than being signed over to the publisher⁹⁵. The RoMEO survey also asked respondents whether in the main, they assigned their copyright to publishers in order to get published. Four options were given: Yes, freely; Yes, reluctantly; No, most publishers I work with don't ask for copyright assignment; and No, I insist that I retain copyright. The results were as follows:

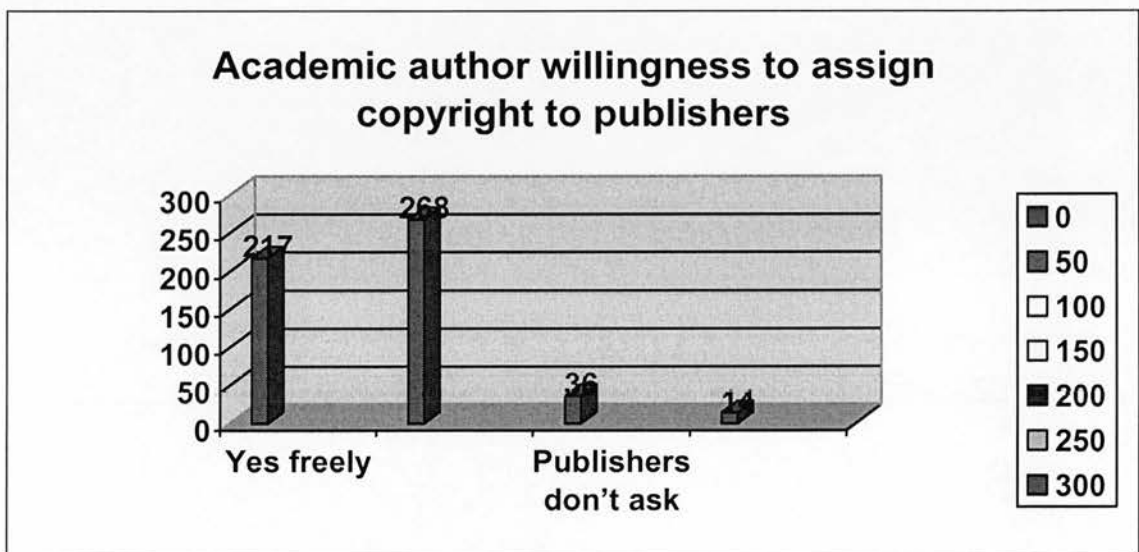


Figure 2 - Statistics taken from Gadd, Oppenheim & Proberts

The largest group of respondents (49%) said that they reluctantly assigned their copyright to publishers. 41% said that they did so freely. Only a handful (7%) said that the publisher did not ask for it, and fewer (3%) insisted on retaining copyright. Therefore it seems that while

⁹⁵ The ALPSP research study on the motivations and concerns of contributors to learned journals, 'What Authors Want' (June 1999) at <http://www.alpssp.org/publications/publ1.htm>

academics are unhappy with the thought of their institution owning copyright in their work, a good proportion of them are happy to relinquish it in exchange for publication.

As far as academics are concerned, as opposed to other authors, they appear to be more concerned about the *intellectual* element of intellectual property, than the *property* one. Their concern is more about the moral rights over their work, (i.e. paying due attribution when quoting from their work) than any economic rights. This is understandable as it is rare for an academic to be paid for a journal article. However, large numbers of publications lead to academic promotion, which in turn leads to increased income. Thus, when faced with an agreement that asks for an exclusive licence to deal with the work, and which insists that 'copyright remains yours' the author happily signs. Academics are often unaware that copyright, as well as offering protection for moral rights, also grants them a series of exclusive 'economic' rights to deal with the work, and if any of these are assigned to a publisher on an exclusive perpetual basis, the academics are no better off than if they had assigned the ownership of the copyright itself⁹⁶. A point that academics may be overlooking is that although publication of academic materials can provide for remuneration in the form of promotion and associated increased income for the author, it cannot be ignored that the academic author and the institution both pay heavily for the use of their own copyright works by students. In other words, apart from assigning ownership of the copyright to the publisher, the institution and the author pay a subscription fee to the journals to house them in a university library and a further fee to a collecting society to permit students to copy such material – in some cases for articles which have been written by the academic himself or herself.

In concluding this section, the writer will set out a view on who should rightfully own the copyright. The surveys and arguments presented above reveal that there are two sides to the issue of ownership of copyright in an academic environment: the question is, if HEIs are happy to waive the ownership of copyright, should academic authors be entitled to more of a legal right than that which they enjoy at present.

⁹⁶ *Op. cit.*, Gadd, Oppenheim and Proberts, n. 71 at pp. 18-19.

Analysis and Conclusion

Two such long-standing practices in Australia and UK universities provide strong evidence of an implied term to this effect in academic contracts of employment, at least in the case of journal articles, other published and unpublished papers and books, and research in progress. First, academic staff has for many years been free to contract with publishers without intervention from the institutions. Secondly, when they move between academic institutions, academics take with them their teaching and research materials produced during the period of their prior employment, without objection by the relevant institution. Such practices are likely to meet the criteria set out in the following passage from *Browne on Usage and Custome* (1875), which was adopted by Stephen J in *Majeau Carrying Co Pty Ltd v. Coastal Rutile Ltd*⁹⁷:

Seeing that a custom is only to be inferred from a large number of individual acts, it is evident that the only proof of the existence of a usage must be by the multiplication or aggregation of a great number of particular instances; but these instances must not be miscellaneous in character, but must have a principle of unity running through their variety, and that unity must shew a certain course of business and an established understanding respecting it⁹⁸.

These are very relevant words when reflecting on the position in the UK: a tussle between custom and law. In Scotland in particular, 'custom' is a variety of law. But, until the courts apply custom in individual cases such rules remain mere custom and in no sense law. When courts use such rules, and make orders, which are enforced in accordance with them, then for the first time these rules receive legal recognition⁹⁹. This notion has been criticised for the fact that it implies that customary rules have no status as law until they are used in litigation. The response to this criticism as formulated by Hart is that 'nothing can be law unless and until it has been ordered by someone to be so'¹⁰⁰. For example, and on the contrary, a statute has already been 'ordered' but a custom has not.

⁹⁷ [1973] 129 CLR 48, 61.

⁹⁸ *Op. Cit.*, Monotti A., & Ricketson S., n. 73 at p. 277.

⁹⁹ Hart H.L.A., *The Concept of Law* (2nd ed.), (Oxford: Clarendon Press; 1994), Chapter 3, pp. 44-49.

¹⁰⁰ *Ibid.*, at p. 46.

Therefore, custom practised by HEIs in relation to the ownership of copyright, does not form the basis of a law until and unless it has been litigated in court. Based on this interpretation, it can be established that the case of *Stephenson Jordan*, as cited above, gives legal status to the customary practice of academics retaining ownership of copyright material for work created within HEIs. Although UK copyright law may not offer an exception such as the US 'teachers' exception', custom, through litigation has paved the way for a similar provision in favour of academic authors. For example, in the case of *Noah v. Shuba*¹⁰¹ an implied term as to copyright ownership was recognised. In this case Dr. Noah, an employee of the Public Health Laboratory Services (PHLS), authored 'A Guide to Hygienic Skin Piercing'. Although PHLS at no time claimed copyright in the Guide, Dr. Noah sued Shuba for infringement of copyright. Although Shuba claimed that PHLS owned the copyright as employer rather than Dr. Noah, the court held that Dr. Noah owned the copyright, having written the Guide outside his duties of employment. Mummery J. also went on to say that even if the Guide had been written within employment, according to the copyright practice of PHLS, copyright would have vested in Dr. Noah¹⁰².

However, it is true that HEIs are also getting wiser in relation to the issue of ownership of intellectual property rights. As far as copyright claims are concerned, if anything, it is research into copyright in databases, websites etc., which will raise the interest of HEIs as the employer. Having said that, members of staff who wish to maximise the opportunity for effective commercialisation of research create contacts, for example, with the University's infrastructure, which encourages and supports innovation, such as Edinburgh Research and Innovation (ERI)¹⁰³. In this kind of situation, a university such as Edinburgh University considers ownership of intellectual property rights very seriously. For example, the ERI website states the following in relation to intellectual property rights and academic publications –

¹⁰¹ [1991] FSR 14 (Chancery Division).

¹⁰² *Ibid.*, at p. 27.

¹⁰³ See ERI website at <http://www.research-innovation.ed.ac.uk/Default.asp> (last accessed 15 June 2006).

It is important for the staff and students of the University to be aware of the value of IPR and to reconcile this with the equally important obligation of the academic publication of ideas and information by the University.

ERI works to provide a service that achieves a balanced approach to ensure that the intellectual output of the University is properly and valuably utilised for the benefit of the University and its staff and students¹⁰⁴.

The wording here seems to imply that the ownership of intellectual property rights will rest with the HEI and its collaborative research centres which should be 'properly and valuably utilised for the benefit of the University and its staff and students'. Furthermore, for the academics that are not linked to a research centre, the situation may be less encouraging. For example, Edinburgh University's employment contracts relating to academics do not have a clause which specifically deals with ownership of copyright, but do state that objectives of the employee are to teach and carry out research¹⁰⁵.

In considering who is entitled to the copyright in research material¹⁰⁶, Gadd, Oppenheim and Proberts have identified that the party who should be entitled to the copyright in research material should be the academic author. The main reason for this seems to be because the desire and ability to pursue scholarly research is seen as part of an 'academic freedom'¹⁰⁷. This argument is further reinforced by Monotti and Ricketson who state that –

Freedom to develop one's particular research agenda also bolsters an argument that the academic owns copyright in research output¹⁰⁸.

However it seems logical that if universities can assert copyright in teaching and learning materials, they can assert copyright in research papers. As pointed out above, research and teaching are both core activities for academics. However, it is interesting to note that

¹⁰⁴ *Ibid.*

¹⁰⁵ Information provided by Human Resources Team Leader, College of Humanities and Social Sciences, University of Edinburgh.

¹⁰⁶ Generally in relation to this question, see, McSherry C., *Who owns Academic Work: Battling for Control of Intellectual Property* (Cambridge, Massachusetts and London, England: Harvard University Press; 2001), chapter 2 "An uncommon controversy".

¹⁰⁷ *Ibid.*, at pp. 9-10.

¹⁰⁸ *Op. cit.*, Monotti A., & Ricketson S., n. 73 at p. 273.

although universities have the possibility of asserting copyright ownership in research outputs their desire to do so has not been very forthcoming. The reasons for this are –

- (1) there is fear of being seen to encroach upon academic freedom;
- (2) there is little or no income to be gained by doing so; and
- (3) if universities own (or licence) rights, they may be obliged to do something with them and this takes extra resources.

Ultimately, what can be drawn from the above arguments is that the ownership of intellectual property rights or copyright created within HEIs is not very clear. But HEIs move more and more towards the model of e-universities, intellectual property rights for the employee academic and employer HEI are only going to grow in importance and become more relevant. In the case of digital works and ownership of copyright, there are two types of laws, which may apply in the present context: the law of the protecting country and the law of the country of origin. Section 11(2) of the 1988 Act is silent on the choice of law point. Yet, as Paul Torremans points out¹⁰⁹, these rules are very much applicable to works created by employees, in the present case, academic authors. The application of the law of the country of origin would have the advantage that the same law would be applicable to all issues concerning ownership. A choice in favour of the law of the protecting country would, however, seem to have the advantage that the copyright industry in a given country would always be able to apply the same law.

In our assessment of the various issues surrounding HEIs and their development, the impact of the law on HEIs and finally, the ownership of copyright within HEIs, it is clear that both the ‘use’ and ‘ownership’ of copyright within these institutions have created a number of issues, although in the former case, the law is somewhat clearer than in the latter. In both cases, more clarity would be welcomed. Furthermore, the two main underlying issues which have come up in this discussion have been the scope of fair dealing in the technological age, particularly in relation to multiple copies (from the user’s point of view) and the position of the academic author in seeking to protect copyright of his or her work (from the right holder’s point of view). Both of these issues have been addressed by the setting up of copyright collecting societies – which is considered in chapters five and six.

¹⁰⁹ Torremans P., *Authorship, Ownership of Rights and Works Created by Employees: Which Law Applies?* [2005] *EIPR* 220.

**AROUND THE WORLD IN THIRTY YEARS
(1975-2004): CASE STUDIES FROM
AUSTRALIA, THE UK AND CANADA**

CHAPTER 4

AROUND THE WORLD IN THIRTY YEARS (1975-2004): CASE STUDIES FROM AUSTRALIA, THE UK AND CANADA

Introduction

Comparable to the sentiment behind the proverb, ‘experience is the mother of wisdom’ HEIs also had to experience and face up to the challenges of copyright in a technologically advanced period, before lessons could be learnt. A case in the 1970s, - *University of New South Wales v. Moorhouse & Anor*¹ (hereinafter *Moorhouse* case) taught an Australian university *how* to embrace new technology within an educational establishment without being held liable for copyright infringement. The Australian experience set a precedent for the rest of the world, including the UK. Most importantly, the case illustrated that HEIs, like individuals, can be held liable for copyright infringement for the installation and inappropriate use of modern technology such as copying machines. A contentious point in this case was whether installing photocopying machines in university premises was ‘an invitation to copy’ for users – and this is discussed in detail below. Following the discussion on *Moorhouse* in Australia, the chapter moves forward a decade to 1988 and the UK – to further analyse the point on ‘invitation to copy’. The case of *C.B.S. Songs Ltd., & Others v. Amstrad Consumer Electronics Plc and Anor*² (hereinafter *Amstrad* case) also queried the issue of ‘invitation to copy’ or ‘authorise’ to copy. Although this case concerned the sound recording of musical works facilitated by twin-tape recording equipment, the core question in relation to reproduction of copyright works remained the same: whether *Amstrad* had ‘authorised’ the breach of copyright by selling double-speed twin-tape recording equipment? The *Amstrad* case considered whether selling recording equipment led to a breach of copyright, or in other words an ‘authorisation to copy’.

Another decade later, in the late 1990s the issue of technological equipment as a medium for copyright infringement was raised again – this time in Canada in the case of *CCH Canadian*

¹ (1975) 133 C.L.R. 1.

² [1988] R.P.C. 567.

*Ltd., v. Law Society of Upper Canada*³ (hereinafter *CCH Canadian* case). The issue first came to court in 1999, but was ultimately resolved in 2004⁴. The Canadian case, like the *Moorhouse* case, considered whether the Law Society authorised copyright infringement by maintaining a photocopier in the Great Library? In this context, the case questioned whether the Law Society of Upper Canada had breached copyright by either (1) providing the custom photocopy service which permitted single copies of the publishers' works to be reproduced and sent to patrons upon their request or by (2) maintaining self-service photocopiers and copies of the publishers' works in the Great Library for use by its patrons. The second question in particular mirrored the contentious point raised in *Moorhouse* and later in *Amstrad* and therefore the discussion will particularly focus on the decision of the Court on this second question.

The relevance of this chapter is to further elaborate the manner in which technological advancements and technological equipment posed a threat to copyright law generally in the 20th and early 21st centuries, and also in educational establishments and libraries, with reference to case law. Whilst the main theme of the three cases surrounds technological equipment as a facilitator for copyright infringement, the underlying theme is the loss of remuneration faced by authors and publishers as a result of such equipment coming into being. As such the cases portray the intrinsic link between the author and publisher on the one hand and technology and users on the other, with the law being pulled from both sides.

The concluding point that needs to be raised by way of introduction is in relation to Copyright Collecting Societies (CCS), which is the final link to the arguments in the thesis. The focus of the chapters so far has been to link the law, technology and HEIs with reference to collecting societies, where appropriate. The present chapter will follow suit, but as a prelude to Part C, Chapters five and six (which examines CCS in depth) this chapter will consider the absence, or the part played, by CCS in these three cases.

³ (2004) SCC 13.

⁴ Appeal and Cross-Appeal from a judgement of the Federal Court of Appeal, [2002] 4 F.C. 213, 212 D.L.R. (4th) 385, 289 N.R. 1, 18 C.P.R. (4th) 161; reversing in part a judgement of the Trial Division, [2000] 2 F.C. 451, 169 F.T.R. 1, 179 D.L.R. (4th) 609, 2 C.P.R. (4th) 129, 72 C.R.R. (2d) 139, [1999] F.C.J. No. 1647 (QL).

Learning lessons from an Australian university: University of New South Wales v. Moorhouse & Another

Facts of the case

This was a case heard in the High Court of Australia at Sydney on appeal from the Supreme Court of New South Wales⁵. Mr. Frank Moorhouse, the first respondent, authored a number of short stories, which were originally published in different magazines at different times before being made into a collection of 20 short stories in the form of a book titled *The Americans, Baby*. By a memorandum of agreement executed on 11th November 1971 Mr. Moorhouse granted to the second respondent – a publisher – the right (exclusive in Australia) to print, publish and sell that work on payment of royalties together with certain additional rights⁶.

The case was initially commenced by the respondents in the Supreme Court of New South Wales and was supported by the Australian Copyright Council (ACC)⁷, which aims to protect the copyright of its members from infringement. ACC raised the argument that some of the copying of copyright material done within university libraries by the use of photocopying machines amounted to an infringement of the copyright. To test the validity of this argument it was decided that a case would be brought against a university. The chosen subject was a graduate of the University of New South Wales, Paul Brennan, who was asked to make an infringing copy of a literary work by the use of a photocopying machine in the library of the University of New South Wales (hereinafter UNSW)⁸.

Accordingly on 28th September 1973 Mr. Brennan attended the library of the UNSW, obtained two books and made two photocopies of one chapter or story of about ten pages from each of those books. One of these was *The Americans, Baby*. It was not established exactly what part of *The Americans, Baby* was copied and since Mr. Brennan was not called as a witness this fact was not confirmed⁹. The other work copied was a book called *Happy Times* but no evidence was given that that work was subject to copyright. Mr. Moorhouse

⁵ *Moorhouse and Angus & Robertson (Publishers) Pty. Ltd. v. University of New South Wales* [1976] R.P.C. 151.

⁶ *Op. cit.*, n. 1 at p. 7.

⁷ <http://www.copyright.org.au/> (last accessed on 1 June 2006). The Australian Copyright Council is an independent not for profit organisation which provides information, advice and training about copyright in Australia.

⁸ *Op. cit.*, n. 1 at p. 7.

⁹ *Ibid.*

was unaware of the proposed arrangement between the ACC and Mr. Brennan to make a copy of part of his book but was later informed what had been done and agreed to join in bringing the proceedings against the appellant, the UNSW¹⁰.

It was alleged that the respondents, i.e. Mr. Moorhouse and his publishers, were the owners of the copyright in the book and in each of the stories that comprise the book. A declaration was made between the date when the book entered the library and the hearing of the summons which stated that the university had authorised such breaches of copyright as occurred by photocopying the whole or part of the library copy of the book by the use of photocopying machines. Such copying did not come under 'fair dealing' especially where breaches were due to reliance upon the library guides or notices, or the lack of supervision of the use of the machines, or of any combination thereof¹¹. It was further alleged that the University had established in its library a number of photocopying machines operated by tokens or coins and Mr. Brennan had committed a breach of copyright even though UNSW alleged they had not authorised it¹².

An action was brought against the UNSW by Mr. Moorhouse as author and Angus Q Roseburn as publisher in the Supreme Court of New South Wales. The Australian Copyright Council supported the action. The UNSW appealed from that order to the High Court and at the hearing of the appeal, the respondent author was given leave to file a cross appeal out of time. The appeal was allowed with costs and the cross-appeal was allowed with no order for costs¹³.

The first question for decision on the cross-appeal was whether the copyright of Mr. Moorhouse was infringed by the UNSW when Mr. Brennan made the two copies of part of *The Americans*, Baby on 28th September 1973¹⁴? The second and more important question was whether UNSW authorised the act done by Mr. Brennan that infringed the respondents' copyright, namely the making of the photocopies? To answer this question, the judges considered the use of photocopy machines within universities and what their existence within such institutions implied.

¹⁰ *Ibid.*, at p. 8.

¹¹ *Ibid.*, at p. 2 and p. 8.

¹² *Ibid.*, at p. 8.

¹³ *Ibid.*, at p. 9.

¹⁴ *Ibid.*, at pp. 10-11.

What the case said about the use of photocopy machines within HEIs: The issues

Lack of appropriate copyright guidelines within the University

The court found that photocopying of copyright material, which was not a fair dealing for purposes of research or private study, was taking place in the University. The reason behind these infringements was due to the fact that UNSW had failed to attach notices to the photocopy machines in a form prepared at the request of the Australian Vice-Chancellor's Committee¹⁵ which set out an interpretation of fair dealing accepted by the Australian Society of Authors and the Australian Book Publishers Association. On the contrary, UNSW issued library guides to most, if not all, students commencing at UNSW and a lesser number of students would receive library guides later in their courses. The library guide in question in the year 1973 contained the following information under the heading 'Copyright'

—

Reader [sic] have a responsibility to obey the law under the Copyright Act 1968.

A copy of the Act is available in the Photocopying Room and there is an extract of relevant sections on each machine.

Photocopying may be done for the purpose of research or for private study and when a copy of the item to be copied has not previously been supplied to the person making the photocopy¹⁶.

The guidelines lacked a vital piece of information – that copying for the purpose of research or private study was only permissible if it amounted to fair dealing of that work. A copy of the Australian Copyright Act 1968 was placed in the photocopying room and a copy of s49 of the Act was displayed above each photocopying machine. However, unless members of the *law school* at the university read them, the meaning would have been obscure to the ordinary layman¹⁷. This is simply because section 49 of the Copyright Act 1968 ran to four pages, and was extremely detailed and rather complicated. Moreover, those provisions

¹⁵ This is the Council of Australia's University Presidents and the site can be found at <http://www.avcc.edu.au/> (last accessed on 1 June 2006). The work that is carried out in the Council is similar to the British Universities UK, formerly known as Committee of Vice-Chancellors and Principals (CVCP). See also, *ibid.*, at p. 14.

¹⁶ *Op. cit.*, n. 1 at p. 15.

¹⁷ *Ibid.*

applied only where a copy was made by or on behalf of a librarian, they had no application where a person using a library makes a copy for himself. A further notice was displayed on each machine within the library in addition to the notice already mentioned. This notice read as follows –

Use of Photocopying Machines –

Occasionally users monopolise photocopying machines. Once 10 copies have been made the next person in the line should be given access to the machine and the mass copier must join the end of the queue¹⁸.

The trial judge opined that such a notice implied that the university was fully aware that there were persons interested in copying large quantities of material, and should have regulated this more appropriately. Yet at the same time, it did not mean that a person making ten copies is copying from the same book – it could be one copy from ten different books, as Justice Gibbs pointed out.

Lack of appropriate supervision of photocopy machines

The court also found that the photocopying machines “were unsupervised in any practical and useful sense, with the knowledge of the university librarian”. The University librarian gave evidence at the hearing. He said that he had instructed ‘attendants’ who were in charge of supervision and use of machines to circulate the relevant provisions of the Act to all members of staff. The librarian stated –

I had asked those people to supervise the machines ...I asked them to watch out for people who were using the machine for an excessive time or who appeared to be copying old books¹⁹.

None of the attendants gave evidence and the attendants had reported no breaches of copyright during the last four and a half years leading up to the case. It is possible that situations similar to that Frank Moorhouse may have taken place in the past, although they may have been overlooked until the present case was brought to light²⁰.

¹⁸ *Ibid.*, at p. 16.

¹⁹ *Ibid.*

²⁰ *Ibid.*

The decision: Chief Justice Gibbs

Based on the findings the following conclusion was arrived at in the *Moorhouse* case. If a person who was allowed to use the library walked in to the library and made a copy of a substantial part of a book taken from the open shelves of the library and did so otherwise than by way of fair dealing for the purpose of research or private study, it can be inferred that the university authorised him to do so, unless the University had taken reasonable steps to prevent an infringing copy of that kind from being made²¹.

Chief Justice Gibbs summed up the above findings of fact and arrived at the present conclusion –

The various measures adopted by the University, even when considered cumulatively, do not appear to me to have amounted to reasonable or effective precautions against an infringement of copyright by the use of the photocopying machines. The library guide might not have come to the attention of all persons using the machines and in any case the statement in it that an extract of the relevant sections was on each machine was erroneous. I am not satisfied that the attendants effectively supervised the use of the machines, at least for the purpose of preventing infringements of copyright. However, *the fatal weakness in the case for the University is the fact that no adequate notice was placed on the machines for the purpose of informing users that the machines were not to be used in a manner that would constitute an infringement of copyright*. It is unnecessary to consider what the position would have been in the present case if the notices on the machines had been sufficient. The fact is that the notices actually placed on the machines, which set out s.49, were completely ineffective for the purpose for which they were apparently intended . . . For these reasons I hold that the University did not adopt measures reasonably sufficient for the purpose of preventing infringements taking place . . . In these circumstances I hold that the University authorized the act of Mr. Brennan in making the copies in question which, as I have held, were infringing copies²² (*emphasis added*).

In commenting on the lack of appropriate guidelines, the lack of supervision at the university and the part of the quote italicised above, it is clear that the UNSW was operating a system to ensure that all users have an equal chance of using the photocopy machines and not a system which aimed to regulate the copying of books, periodicals and manuscripts. In fact

²¹ *Ibid.*, at p. 16.

²² *Ibid.*, at p. 17.

by requesting that the user joins the end of the queue once he/she has made 10 copies implies that the UNSW was indeed more interested in encouraging copying and hence copyright infringement rather than the regulation of copyright law.

The decision: Justice Jacobs

Justice Jacobs, agreeing with Justice Gibbs, found that the University's guidelines and notices were an 'invitation' to copy. Justice Jacob stated that the real question is whether there was in the circumstances an implied invitation that he, in common with other users of the library, might make such use of the photocopying facilities as he thought fit?²³ The question was examined by considering a hypothetical scenario and by looking at a library open to all persons either freely or on payment of a fee. In these circumstances, Justice Jacobs questioned whether this was not an invitation to any user to make use of the machines as they saw fit? He further questioned whether it would be an invitation, which extended to acts done in response to the invitation?²⁴ The trial judge answered in the positive and confirmed that it was an invitation to copy. He further pointed out that the invitation is on the face of it an unlimited invitation – authorisation is given to use the copying machine to copy library books²⁵.

However, Justice Jacobs distinguished the above hypothetical facts from the facts of the case by illustrating, firstly, that the appellant's library was not open to all comers – it was a University library where copy and use of works was for research and private study²⁶. Secondly, the fee payable for the use of the copying machines did not, or was not intended to bring the appellant a profit. In these circumstances, knowledge or lack of it would not change the terms of the invitation extended by the supply of books and machines, given that the invitation was not qualified in any way²⁷. The invitation was qualified by the posting of notices displaying section 49 of the Copyright Act 1968 but this section related to copies made by or on behalf of the librarian, not to copies made by users on their own behalf. In Paul Brennan's case, the unqualified nature of the invitation led him to make two photocopies of one chapter or story of about ten pages from *The Americans Baby*²⁸.

²³ *Ibid.*, at p. 21.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*, at p. 22.

²⁷ *Ibid.*

²⁸ *Ibid.*, at p. 23.

Analysis: The relevance of *Moorhouse* to the present discussion – lessons to be learnt

This case is significant in illustrating the consequences of having copy machines within HEIs without adequate guidelines on copyright law. Appropriate guidelines should include the law on copying for research and private study within educational institutions under the provision of fair dealing and more importantly, which acts breach copyright law. In other words, the copying guidelines should clearly state what can and cannot be done. As Justice Jacobs stated, having photocopy machines within a library is an invitation to copy material from within the library. This invitation can be qualified with appropriate guidelines and notices, which can feature on the photocopying machines, provided these, are located near such machines and are clear, visible and can be understood by the layperson.

This case revolutionised copying within the libraries of HEIs and emphasised the need to use photocopying machines flanked by appropriate guidelines and notices, yet it also highlighted the consequences of abuse or over-use. Gipe recounts the use of photocopy machines within libraries in the 1960s²⁹, the decade of the photocopy boom, illustrating that these machines were not acquired by the libraries but were installed on the premises by the franchisee of the manufacturer. He goes on to say that the library acted as a

friendly landlord, supplying floor space to the franchisee and furnishing power for the machine's operation, but nothing else . . . the primary concern of the library is that its patrons have some form of copying service . . . there is no mention of copyright infringement³⁰.

This kind of arrangement would have excluded the libraries from any sort of copyright infringement. However in addition to this system, Gipe relates that most libraries owned or rented copiers, which were handled by staff members only. Even then, photocopy machines were looked upon as a money saving device, which prevented the wear and tear of books and saved time. Therefore the issue of copyright was knowingly ignored during this time. As one librarian said –

²⁹ Gipe n., *Copyright and the Machine: Nearer to the Dust* (Baltimore: the Williams & Wilkins Co., 1967) pp. 60-62.

³⁰ *Ibid.*

I have knowingly ignored the problem of copyright . . . we set certain limits, of course, to the number of pages or the number of articles, but these are quite liberal. Faculty can have 900 pages of any library material free during a year³¹.

- Jerome S. Rauch, Librarian of the New Jersey College of Medicine and Dentistry

It appears then that during the 1960s and 70s the use of the new copying device, the photocopy machine, was encouraged. 'Do not mutilate this book. You may deprive 400 other students of its use. Use the Xerox machine'³² was the general ethos. Somehow fair dealing and fair use, which had been firmly established on both sides of the Atlantic, was in danger of becoming obsolete. As such the celebrated *Moorhouse* case was a blessing in disguise and a much-needed answer to deal with the latest challenge to copyright law.

The case illustrated that where a university owns copying devices and has not taken reasonable steps to avoid copyright infringement, and where the university knew, or had reason to anticipate or suspect, that the infringing act was to be, or was likely to be done³³, the liability would fall on the university. Therefore the case emphasised that the responsibility lies with the university to ensure that appropriate copying guidelines are placed on or near the photocopy machines, and that supervision of these machines and the resulting copying are diligently carried out to avoid a similar scenario. For example, the University of Edinburgh accounts for approximately 480 photocopiers and near each of these photocopiers there is a clear and visible notice which is displayed and sets out what can be copied and how much can be copied.

As the underlying theme of the thesis is HEIs and their interaction with copyright collecting societies, it is important to consider the present case in such a context. The *Moorhouse* case was heard in 1974, prior to the setting up of the Australian Copyright Agency Limited (CAL) in 1989³⁴. CAL is the Australian equivalent of the UK Copyright Licensing Agency

³¹ *Ibid*, at p. 61.

³² *Ibid*, at p. 62.

³³ Section 36 Copyright Act 1968. The Act was ultimately amended in 1980 to improve and restructure the effect of *UNSW v. Moorhouse* as far as photocopying in educational institutions is concerned.

³⁴ Copyright Agency Limited (CAL) established in 1989 'provides a bridge between creators and users of copyright material. CAL represents authors, journalists, visual artists, surveyors, photographers and newspaper, magazine and book publishers as their non-exclusive agent to license the copying of their works to the general community'. CAL is the Australian equivalent of the Copyright Licensing Agency (CLA) in UK. The website for CAL can be found at <http://www.copyright.com.au/> (last accessed 1 June 2006).

(CLA). If the University of New South Wales were a member of CAL today, the University would have had a licence with the collecting society to make multiple copies outwith the fair dealing provision. The terms of the licence would state what and how much an individual could copy and the University would enter in to a licence scheme of some form with the collecting society³⁵. Entering in to such a licence scheme ensures that an institution such as a HEI can reproduce from works protected by copyright outwith the fair dealing proviso, but within the boundaries of the licence terms established between the HEIs and copyright collecting societies. Furthermore, having such a system in place provides for the carrying out of supervisions by copyright collecting societies every so often to monitor copying within HEIs. A collecting society would also ensure that according to the terms of the licence, the university displays appropriate notices near the photocopier machines and distributes guidelines to existing and prospective users.

As such, the question that can be asked here is whether the decision of the *Moorhouse* case would have been different if CAL had existed and if the University of New South Wales had had a licence with a collecting society? The answer is 'yes'; not merely because the above rules would have been adhered to, thus ensuring that the university's liability would have been significantly diminished, but because the collecting society that plays middleman and is responsible for distributing the remuneration would have had more of a responsibility towards the creator and publisher than the university. After all it is the 'middle-man' who gets paid from both sides – creators/publishers on the one hand for keeping track of reproduction of their work and universities on the other for the convenience of a one-stop-shop in exchange for a significant sum of money.

Applying the case to the modern day is indicative of a change in the trend since the inception of collecting societies and the role they play within HEIs; there has been a definite shift in responsibility from the university to the collecting societies. The price a university pays for this arrangement is a substantial fee known as a blanket licence fee under a licence scheme: copyright collecting societies are described in the next chapter. In other words, in exchange for the fee, a university makes an implied statement that they have obtained an appropriate

³⁵ The Australian equivalent of the British blanket licence scheme between CLA and HEIs is *The Statutory Educational Licence*, which allows educational institutions to reproduce and communicate from any work for their educational purposes within the limits set out in the Copyright Act 1968. The licence sets out how much can be copied, what can be copied and what needs to be done where copying is in excess of the limits of the Statutory Educational licence. Information about licences for educational institutions can be found at <http://www.copyright.com.au/licensing.htm> (last accessed 1 June 2006)

licence for copying works protected by copyright law and therefore should be excluded from liability where, for example, the reproduction of a book protected by copyright is less than 10% of that book. Therefore whilst this case illustrates the responsibility that HEIs undertake when placing photocopying machines within their institutions, the case also illustrates the importance of the interaction between HEIs and collecting societies in striking a healthy balance between the creator and user.

However, in keeping with the structure of this chapter, it is now timely to consider whether lessons were learnt from the *Moorhouse* case and implemented in the UK? Or was the UK more inclined to consider *Moorhouse* as an exceptional case, which took an extreme view in favour of copyright holders? The *Amstrad* case contemplated the answer to this issue, as discussed below. At the outset it must be pointed out that the main point in considering the *Amstrad* case, which has no direct relevance to HEIs or photocopying machines, is to examine the issue of whether electronic equipment which provides for the reproduction of copyright protected musical works is an 'authorisation to copy', leading to an 'authorisation' to breach copyright.

C.B.S. Songs Ltd. & Others v. Amstrad Consumer Electronics Plc & Another³⁶

Facts of the case

The facts of the case arose from a conflict between the makers of records and the makers of recording equipment³⁷. The appellants, the British Phonographic Industry Ltd. (hereinafter B.P.I.), represented the makers of records whilst the respondents, Amstrad Consumer Electronics Plc. and Dixons Ltd., represented the makers and sellers respectively of recording equipment. B.P.I. argued that it was unlawful for Amstrad to make recording equipment, which was used by members of the public to copy records in which copyright subsisted. B.P.I. also argued that Amstrad advertised their equipment in such a way as to encourage copying. Amstrad and Dixons argued that they lawfully made and sold to the public recording equipment and lawfully advertised the advantages of such equipment. Amstrad also drew attention to the footnote, which appeared in their advertisements, which warned that some copying required permission and made clear that Amstrad did not have the authority to grant such permission. It read as follows –

³⁶ (1988) R.P.C. 567.

³⁷ For facts of the case, see, *ibid.*, pp. 567-583.

The recording and playback of certain material may only be possible by permission. Please refer to the Copyright Act 1956, the Performers' Protection Acts 1958-1972³⁸.

The proceedings in this case was lengthy. It commenced with Amstrad responding to B.P.I.'s allegations by issuing a writ, which sought declaration that they had not advertised, offered for sale, sold or supplied their systems or acted unlawfully (the *Amstrad* action). The plaintiffs, in whom the relevant copyrights were vested, issued a writ on behalf of themselves and other copyright owners alleging *inter alia* infringement of copyright and sought an injunction to restrain sale of the audio systems in question (the *C.B.S.* Action). The *C.B.S.* action was stayed pending trial of the *Amstrad* action and then until judgement, upon an appeal in the Court of Appeal, which found in favour of the defendants, *Amstrad*. Following the Court of Appeal judgement, B.P.I. appealed to the House of Lords.

During the passage of the case, and in the Court of Appeal, B.P.I. relied heavily on the *Moorhouse* case to break down the arguments of the *Amstrad* case³⁹. In the Court of Appeal, the plaintiffs B.P.I. stressed the element of Jacobs J's 'invitation' together with the provision of at least some of the means for doing it and went on to point out that together they constituted 'authorising' to copy. They also pointed out that in that case, the Court held the UNSW liable for copyright infringement. The plaintiffs further cited section 1(2) of the UK Copyright Act 1956 and said that 'authorise' in the context of the Act should be understood in its ordinary dictionary meaning of "sanction, approve and countenance"⁴⁰. Whitford J. expressed this reasoning, in *C.B.S. Inc., v. Ames Records & Tapes Ltd.*⁴¹, citing Bankes and Atkins LJ in *Falcon v. Famous Players Film Co*⁴². In this case the defendants hired to a cinema a film based on the plaintiff's play. It was held that the defendants infringed the plaintiff's exclusive right conferred by the UK Copyright Act 1911 to authorise a performance of the play. In backing up this point they referred to Kearney J. in another Australian case, *RCA Corporation v. John Fairfax & Sons Ltd*⁴³, to establish their point –

³⁸ *Ibid.*, at p. 602.

³⁹ *Ibid.*, pp. 575-576; 586.

⁴⁰ *Ibid.*, p. 575.

⁴¹ [1982] Ch. 91 at p. 109.

⁴² [1926] 2 K.B. 474 at pp. 491, 499.

⁴³ [1982] R.P.C. 91.

Authorising' is a somewhat strange word in this context, because one is dealing with an "unauthorised authorisation"; authorisation in fact by someone who in law has no authority. It covers a purported grant of permission. Where a record is made without the permission of the copyright owner, the seller is said to authorise the infringement because he is authorising the natural use of what he sells⁴⁴.

However, the Appeal Court in the case of *C.B.S. v. Amstrad* considered the matter of 'authorisation' in a different manner. The Court of Appeal unanimously held that the defendant, in the *Amstrad* case, had not authorised anyone to infringe the copyright in any musical work or sound recording as alleged by the plaintiffs⁴⁵. The factors that influenced the Court of Appeal to find in favour of the defendants were:

- (a) The absence of any power in the defendants to authorise or control the activities of people using their audio systems after they had left their hands;
- (b) The absence of any purported exercise by the defendants of any such power;
- (c) The incongruity of the suggestion that the defendants might have granted or purported to grant to all and sundry the users of their audio systems the right to make unlicensed tape recordings of musical works and sound recordings protected by copyright⁴⁶.

Referring to the cases cited by the plaintiffs, in particular the Australian *Fairfax* case, the Court of Appeal held that the statutory tort of authorising a breach of copyright was not complete until a breach attributable to the alleged authorisation had occurred. In support of this point the Court stated that it is an essential requirement of liability under section 1(2) of the Copyright Act 1956 that the act or acts alleged to constitute an authorisation of infringement should have been committed "in relation to" the particular work for which protection is claimed⁴⁷. In relation to the *Moorhouse* case, the Court pointed out that in that case the Court was not asked to focus on the statutory language circumscribing the right said

⁴⁴ *Ibid.*, p. 100, *per* Kearney J., approving Laddie, Prescott and Vittoria, *The Modern Law of Copyright* (1980) para. 12.9, p. 403 as cited in *op. cit.*, n. 36 p. 575.

⁴⁵ *Op. cit.* n. 36 p. 586.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

to be infringed⁴⁸. The Court held in favour of the defendants *Amstrad* and the plaintiffs appealed to the House of Lords.

The Decision: Lord Templeman

The issue of 'authorisation'

In relation to B.P.I.'s submission that Amstrad by their advertisement 'authorised' the purchaser of an Amstrad model to copy records in which copyright subsisted, Lord Templeman stated that the advertisement did not authorise the unlawful copying of records. On the contrary, the footnote warned that some copying required permission and made it clear that Amstrad had no authority to grant that permission. If Amstrad had considered the interests of copyright owners, Amstrad could have declined to incorporate double-tape double-speed recorders in Amstrad's models or could have advertised the illegality of home copying⁴⁹. If Amstrad had deprived themselves of the advantages of offering improved recording facilities, other manufacturers would have reaped the benefit. As Lord Templeman further pointed out, Amstrad's advertisement came under scrutiny because Amstrad 'flouted the right of copyright owners' and 'advertised the increased efficiency of a facility capable of being employed to break the law'⁵⁰.

Referring to case law and to the case of *Falcon v. Famous Players Film Co.*, the Court conveyed the point that in that case the hirer had sold the use which was only capable of being an infringing use. In the same case Atkin LJ stated –

To 'authorise' means to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor⁵¹.

Lord Templeman, agreeing with Atkin LJ in *Falcon*, held that *Amstrad* did not sanction, approve or countenance an infringing use of their model. In the context of the Copyright Act 1956, an authorisation is a grant or purported grant, which may be express or implied, of the

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, at p. 604.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

right to do the act complained of. The Court held that Amstrad conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy.

The House of Lords then went on to distinguish between *Moorhouse* and the present case. In the *Moorhouse* case, Gibbs J. suggested that UNSW had the possibility of controlling the means by which an infringement of copyright may have been committed, but did not take appropriate steps to 'limit its use to legitimate purpose'. In such a case the UNSW 'authorises' any infringement that resulted from its use⁵². However in the *Amstrad* case, Amstrad had no control over the use of their model once they were sold. In support of their decision the Court also referred to *C.B.S. Inc., v. Ames Records & Tapes Ltd.*, another English case cited by the appellants. In this case it was held that a record library, which lent out records and simultaneously offered blank tapes for sale at a discount, did not authorise the infringement of copyright in the records. The Lords stressed the dictum of Whitford J., in *Ames Records* –

Any ordinary person would, I think, assume that an authorisation can only come from somebody having or purported to have authority and that an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act⁵³.

On the facts stated above, and particularly relating to the issue of 'authorisation', the House of Lords held in favour of the respondents, Amstrad. The rhetoric of Lord Templeman illustrates the conflict faced by copyright owners and manufacturers of technological/electronic equipment in a technological era –

During the past half-century there have been continuous improvements in sciences and techniques concerned with the transmission reception, recording and reproduction of sounds and signals. These developments were required for serious purposes such as war, espionage, safety and communications. The benefits of advances made for serious purposes have been employed for purposes of leisure and pleasure and have spawned two flourishing industries, the electronic equipment industry and the entertainment industry . . . Facilities for recording and reproducing incorporated in machines sold to the public by the electronic equipment industry are

⁵² *Ibid.*, at p. 605.

⁵³ [1982] Ch. 91 at p. 106 as referred to by Lord Templeman in *Amstrad* at p. 605.

capable of being utilised by members of the public to copy . . . The public make use of those facilities to copy the recordings issued by recording companies and thus infringe the copyrights of the recording companies and of the composers, lyricists and others engaged in the entertainment industry. Hence arises the conflict between the electronic equipment industry and the entertainment industry⁵⁴.

Analysis: authorising an unauthorised action?

The *Amstrad* case differed completely from the *Moorhouse* case and illustrated that in an era of electronic equipment and where mass copying had become commonplace, the making of electronic equipment, installing them or selling them, did not make the manufacturer or seller liable. Provided there was some warning that the manufacturers were not responsible for seeking permission from the copyright owners, the *Amstrad* case established that contrary to *Moorhouse*, the selling of such equipment, which has the ability to reproduce copyright works, was not an 'invitation to copy' or an invitation 'authorising' the breach of copyright. Interestingly, and once again contrary to *Moorhouse*, the present case was brought by a collecting society, B.P.I. The question is whether the involvement of a collecting society led to the differing decision? It does not seem to be the case as, ironically, the copyright owners Angus Moorhouse and his publisher won the case in *Moorhouse*, whereas C.B.S. represented by B.P.I. lost their appeal. However, the *Amstrad* case demonstrated that collecting societies are very much committed to protecting copyright owners, judging by the long journey taken by B.P.I. – unfortunately to reach an unsuccessful result. In any case, C.B.S. together with B.P.I., had certainly become very much aware of the risks to copyright posed by electronic equipment, which had the ability to reproduce and infringe copyright works. B.P.I.'s aim possibly was an attempt to stop such equipment reaching the market – although this would have been impossible with the rapid advancement in technology.

Possible lessons learned in the UK as a result of this case are also worthy of note. For example, since 1977 the Whitford Committee had pushed for a levy on blank tapes, which had been met with favourable consideration. However, in face of the difficulties inherent in the problem generated by mass-production of electronic equipment capable of infringing copyright, it is disappointing to note that Parliament did not follow Whitford Committee's recommendation. As Lord Templeman noted –

⁵⁴ *Ibid.*, p. 597.

These proceedings will have served a useful purpose if they remind Parliament of the grievances of the recording companies and other owners of copyright and if at the same time they drew the attention of Parliament to the fact that home copying cannot be prevented, is widely practised and this brings the law to disrepute⁵⁵.

In conclusion and to re-iterate the difficulties thrown up by the intrinsic link between law, copyright owners, users and technology, the words of Lord Templeman are appropriate –

Copyright law could not envisage and now cannot cope with mass-production techniques and inventions, which create a vast market for the works of a copyright owner but also provide opportunities for his rights to be infringed. Parliament could place limitations on the manufacture or sale of certain types of tape recorder and could prescribe notices and warnings to be included in advertisements⁵⁶.

The *Amstrad* case may have solved the issue of ‘authorisation’ for the moment, but a decade later similar issues of ‘authorisation’ and ‘invitation to copy’ were brought to the forefront once again – this time in Canada.

CCH Canadian Ltd. v. Law Society of Upper Canada⁵⁷

Facts of the case

The Great Library at Osgoode Hall in Toronto is maintained by the appellant Law Society of Upper Canada and is a reference and research library with one of the largest collections of legal materials in Canada. The Law Society has regulated the legal profession in Ontario since 1822 and, since 1845, the Law Society has maintained and operated the Great Library at Osgoode Hall. The Great Library also has a request-based photocopy service for Law Society members, the judiciary and other authorised researchers. As it is a request-based service, when members request photocopies, the copies are made by the library staff and delivered in person, by mail or by facsimile transmission to requesters. There are also self-service photocopiers reserved for patrons, which are also maintained by the Law Society.

⁵⁵ *Ibid.*, at pp. 611-612.

⁵⁶ *Ibid.*, at p. 610-611.

⁵⁷ (2004) SCC 13. See also, <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2004scc013.wpd.html> (last accessed 1 June 2006).

The respondents CCH Canadian Ltd., Thomson Canada Ltd. and Canada Law Book Inc., publish law reports and other legal materials. In 1993 the respondent publishers brought an action against the Law Society alleging that the Law Society had breached copyright when the Great Library reproduced a copy each of eleven of its copyright works. The publisher also sought a permanent injunction to prohibit the Law Society from reproducing these works as well as any other works that they published. The Law Society counterclaimed stating that copyright is not infringed when a single copy of a reported decision, case summary, statute or regulation is made by the Great Library staff or one of its patrons at the self-service photocopier for the purpose of research. The Federal Court, Trial Division, allowed the publishers' action in part, finding that the Law Society had infringed copyright in certain works; it dismissed the Law Society's counterclaim. The Federal Court of Appeal allowed the publishers' appeal in part, holding that all works were original and therefore covered by copyright. It dismissed Law Society's cross-appeal.

The Decision: The Chief Justice

On appeal from the Trial Division, it was held that the appeal should be allowed and the cross appeal dismissed. The Law Society did not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise was made by the Great Library in accordance with its access policy. The Court established that under section 29 of the Canadian Copyright Act, fair dealing for the purposes of research or private study does not infringe copyright⁵⁸. Moreover, the Law Society does not authorise copyright infringement by maintaining a self-service photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright. The Judge stated that –

While authorisation can be inferred from acts that are less than direct and positive, a person does not authorise infringement by authorising the mere use of equipment that could be used to infringe copyright⁵⁹.

To elaborate on this point, s. 29 of the Canadian Copyright Act 1985 as amended by the Canadian Copyright Act 1997 was referred to. Under this Act 'research' is given a large and liberal interpretation to avoid undue constraints, especially with regard to the

⁵⁸ *Ibid.*, p. 20

⁵⁹ *Ibid.*, p. 23.

commercial/non-commercial distinction⁶⁰. The Act provides guidance to help determine whether a dealing is fair: the purpose of the dealing; the character of the dealing; the amount of the dealing; the nature of the work; available alternatives to the dealing and the effect of the dealing on the work. Applying these factors to the Law Society, the court found that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair. The access-policy places appropriate limits on the type of copying that the Law Society will do. Copies will be permitted for the purposes of research, criticism, review or private study. Where the act of copying is questionable, it is reviewed by the reference librarian who has the right to refuse to fulfil a request.

Under this provision, the court went on to establish that the Law Society does not infringe copyright nor does it authorise infringement by providing self-service photocopiers for use by its patrons in the Great Library. In other words, a person does not authorise infringement by authorising the mere use of equipment that could be used to infringe copyright. There was no evidence that the copiers had been used in a manner that was not consistent with copyright law. Even if there were evidence of the copiers having been used to infringe copyright, the Law Society does not have sufficient control over the patrons to sanction the infringement⁶¹.

The court also held that there was no secondary infringement by the Law Society. The Law Society's fax transmissions of copies of the respondent publishers' works to lawyers in Ontario were not communications to the public. While a number of fax transmissions to a number of people of the same work may constitute copyright infringement, there was no evidence of this having occurred in this case. Nor did the Law Society infringe copyright by selling copies of the publishers' works.

The questions addressed by the court

The two main questions that had to be answered was whether the Law Society has breached copyright by either:

- (a) Providing the custom photocopy service in which single copies of the publishers' works are reproduced and sent to patrons upon their request or;

⁶⁰ S. 29.3(1) – 29.4 of the Canadian Copyright Act 1997. The 1997 Act repealed the Copyright Act 1985.

⁶¹ (2004) SCC 13 at p. 29.

(b) Maintaining self-service photocopiers and copies of the publishers' works in the Great Library for use by its patrons.

To answer these two questions the court had to address the following sub-issues:

- (1) Are the publishers' materials 'original works' protected by copyright?;
- (2) Did the Great Library authorise copyright infringement by maintaining self-service photocopiers and copies of the publishers' works for its patrons' use?;
- (3) Were the Law Society's dealings with the publishers' works 'fair dealing[s] under s. 29 of the Copyright Act, R.S.C. 1985 as amended'?; and
- (4) Did Canada Law Book consent to have its works reproduced by the Great Library?

Of the above noted sub-issues, the most important for the purposes of this paper is (2). (3) will also be considered in the following pages.

(2) Did the Great Library authorise copyright infringement...?

At the hearing it was argued by the respondent publishers that under s. 27(1) of the Copyright Act 1997, it is an infringement of copyright for anyone to do anything that the Act only allows owners to do, including authorising⁶² the exercise of his or her own rights. Accordingly their argument was that the Law Society is liable for breach of copyright under this section because it implicitly authorised patrons of the Great Library to copy works in breach of the Copyright Act.

However, patrons in the Great Library have used self-service photocopiers for several decades. The patrons' use of the machines is not monitored directly. Since the mid-1980s, the Law Society had displayed the following notice near the self-service photocopiers –

The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by users of these machines⁶³.

⁶² As to what is meant by 'authorise' was explained at the hearing and explained that it was to "sanction, approve and countenance". See also *Amstrad* case in this regard.

⁶³ (2004) S.C.R. 13 at p. 15.

At the trial, the Law Society applied for a declaration that it did not authorise copyright infringement by providing self-service photocopiers for patrons of the Great Library. No evidence was given to prove that the photocopiers had been used in an infringing manner. The Federal Court of Appeal, relying in part on the Australian High Court decision in *Moorhouse*, concluded that the Law Society 'implicitly sanctioned, approved or countenanced copyright infringement of the publishers' works by failing to control and copying and instead merely posting a notice indicating that the Law Society was not responsible for infringing copies made by the machine's users'⁶⁴.

The Chief Justice, in the Supreme Court, disagreed with the above proposition and also pointed out that Australian case law was inconsistent with previous British and Canadian approaches to this issue. The Chief Justice opined that the *Moorhouse* approach to authorisation shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole. Applying this reasoning to the present case, the Chief Justice concluded that the Law Society's mere provision of photocopiers for the use of its patrons did not constitute authorisation to use the photocopiers to breach copyright law for three reasons.

First, the court found that there was no evidence that the photocopiers had been used in a manner inconsistent with copyright law. The court also went on to say that a person does not infringe copyright by authorising the mere use of equipment such as photocopiers that could be used to infringe copyright.

Secondly, the Court of Appeal was wrong to find that the Law Society's posting of the notice constitutes an express acknowledgement that the photocopiers will be used in an illegal manner. Being the Law Society, which is responsible for regulating the legal profession in Ontario and has been doing that since 1822, it is more logical to conclude that the notice was posted for the purpose of reminding the Great Library's patrons what they can do and what they cannot under the copyright laws.

Thirdly and as already set out above, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement.

⁶⁴ *Ibid.*, at p. 17.

Based on the above findings, the court concluded that the Law Society did not authorise copyright infringement by providing self-service photocopiers and copies of the respondent publishers' works for use by its patrons in the Great Library. The appeal was allowed.

Analysis and Conclusion: lessons in copyright – have they been learnt?

One of the striking arguments in this case, which is most relevant to the present discussion, is that of the second question considered above. It is interesting also that the three cases, three decades apart, reflect similar questions in relation to the law but arrived at contrasting decisions. The reader may wonder why cases based on such similar facts arrived at such different conclusions. There are three reasons, which contribute towards the decisions – all of which revolve around appropriate copying guidelines within institutions which house photocopying machines.

The first is a practical and logical reason. The case of *Moorhouse* arose about a decade after the photocopy boom in 1965. Copyright law was struggling to keep up with this latest technological advancement, attempting to regulate the copying and attempting to regulate institutions and organisations that encouraged the use of the *Xerox* photocopier. It seemed that 'fair dealing' was being stretched to its limits. As such, it is possible that an extreme decision as the one delivered in the *Moorhouse* case was needed to keep the law abreast with technology. The decision was clearly in favour of the copyright owner; however, it pulled the reins on those owning and renting photocopying machines to take care when opening them up to public use. Universities and libraries in particular started to take greater care about the appropriate use and supervision of copy machines. This was carried out by posting clear guidelines near the photocopy machines as to what could and could not be copied and posting the relevant section of the law on 'fair dealing'. This case obviously had an effect on other industries too, as was illustrated in the *Amstrad* case, which came about at the height of technological developments. Although *Amstrad* went on to manufacture and sell electronic equipment capable of reproducing copyright works, they did so by taking care to warn customers that it is the customers' responsibility to seek permission from copyright owners.

Secondly, the *Moorhouse*, *Amstrad* and *CCH Canadian* cases in particular differ in relation to the use of the copying equipment. In the former case, the issues pointed towards the fact that the responsibility of use of a photocopy machine which lacked appropriate guidelines as to its use and which infringed copyright would lie with the institution, which had owned or

rented the equipment. As such, Chief Justice Jacobs went on to say that the appropriate copying guidelines were an 'invitation to copy' and exclusion of liability for the institution which houses such equipment will depend on whether the guidelines have been qualified or not. As such in the case of *Moorhouse*, the unqualified nature of the invitation led Paul Brennan to do what he did and escape liability at the same time, whilst the university carried the liability.

In the *Amstrad* and *CCH Canadian* cases, the court found that there was no evidence that the tape recorders or photocopiers had been used in a manner inconsistent with copyright law. The respective courts also went on to say that a person does not infringe copyright by authorising the mere use of equipment such as twin-tape tape recorders or photocopiers that could be used to infringe copyright, which clearly distinguished this case from the former. However, it must be pointed out that in the modern age, the use of copy equipment implies that copyright infringement could be a possibility. This is one of the reasons why some countries such as Germany impose a levy scheme on certain goods, which have the capacity to copy, to cover possible infringements⁶⁵.

A third reason is that at the time of the *Moorhouse* case, 'fair dealing', although established in statute law, had not been challenged, especially within HEIs and libraries, before the advent of the photocopy machine. The drafting of the Australian 'fair dealing' provisions, like those in other jurisdictions has been left broad, with little legislative guidance as to what is to be considered with respect to determining the 'fairness' or otherwise of a dealing. The reason for this broad scope of the legislation as Peter Brudenall⁶⁶ explains, is to provide courts with a wide discretion to shape the law in this area based on varying factual situations. As such, in the *Moorhouse* case Chief Justice Gibbs commented -

The principles laid down by the Act are broadly stated, by reference to such abstract concepts as 'fair dealing' (s.40) and 'reasonable person' (s.49) and it is left to the

⁶⁵ See, Christie A. F., Private Copying license and levy schemes: resolving the paradox of civilian and common law approaches in Vaver D. & Bently L., (eds.) *Intellectual Property in the New Millennium – Essays in Honour of William R. Cornish* (Cambridge, New York, Melbourne: Cambridge University Press; 2004), chapter 17, pp. 250-255.

⁶⁶ See also, Brudenal P., The Future of Fair Dealing in Australian Copyright Law (1997) (1) *The Journal of Information, Law and Technology (JILT)* at http://elj.warwick.ac.uk/jilt/copyright/97_1brud/ (last accessed on 1 June 2006).

courts to apply those principles after a detailed consideration of all the circumstances of a particular case⁶⁷.

It may also be speculated that it is the unclear nature of the fair dealing proviso under the Copyright Act 1968, which ultimately led the courts to arrive at the decision, they did, coupled together with the challenges posed by the photocopying machine. Lessons were learnt from the *Moorhouse* case and the importance of appropriate guidelines to inform users about copyright infringement, were thereafter, seen as standard practice.

The *CCH Canadian* case and its outcome is illustrative of a clear interpretation of the 'fair dealing' provisions and its application to case law⁶⁸. The modern Canadian law can be praised for its coherent provisions and for its clear wording.

Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and user's interests, it must not be interpreted restrictively . . . as an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the Copyright Act . . . The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study⁶⁹.

In Section 29 of the Canadian Copyright Act 1985 as amended by the Canadian Copyright Act 1997, 'research' is given a large and liberal interpretation to avoid undue constraints, especially with regard to the commercial/non-commercial distinction⁷⁰.

⁶⁷ See above n. 1 at p. 12.

⁶⁸ Hale C., Dealing a New Hand to Copyright Users - The Supreme Court Considers Fair Dealing at http://www.blakes.com/english/publications/brip/article.asp?A_ID=160&DB=blakesProperty (last accessed on 1 June 2006). This article takes an insight in to the different issues in the case and in particular fair dealing.

⁶⁹ See n. 57 at p. 13 of 22.

⁷⁰ S. 29.3(1) – 29.4 of the Canadian Copyright Act 1997. The 1997 Act repealed the Copyright Act 1985.

I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128 that “[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs ad factum is nonetheless research”. Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the Copyright Act⁷¹.

Furthermore, the Act provides guidance to help determine whether a dealing is fair⁷². These factors would have certainly played a major role in arriving at the decision it did in the *CCH Canadian* case. The *Amstrad* case did not touch upon ‘fair dealing’.

When analysing the case of *Moorhouse*, it was argued that the lack of a collecting society at that time might have had an adverse effect on the decision and ultimately on the UNSW. During the hearing of the *CCH Canadian* case, the Canadian Copyright Licensing Agency (Access Copyright) acted as the interveners. However, the court stated that the availability of a licence is not relevant to deciding whether dealing has been fair⁷³. This implies that a university is not completely excluded from liability even though it may have paid a blanket fee as an indirect means of getting the authors’ permission and in order to cover themselves from similar situations. In expanding on this point the court went on to say that –

... fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person’s decision not to obtain a license as proof that his or her dealings were not fair, this would extend the scope of the owner’s monopoly over the use of his or her work, in a manner that would not be consistent with the Copyright Act’s balance between owner’s rights and user’s interests⁷⁴.

Once again the court attempts to illustrate that a licence (collective or otherwise) *per se* would not have excluded liability. When considering fair dealing many factors have to be taken into account as already noted above and as such having, or not having, a licence *per se* is insufficient. It has clearly got to be considered in the context of the bigger picture. Based

⁷¹ See n. 57 at p. 13 of 22.

⁷² See, *supra* pp. 136-137.

⁷³ See n. 57 at p. 17 of 22.

⁷⁴ See n. 57 at p. 17 of 22.

on these arguments and contrary to the conclusion arrived at when discussing *Moorhouse* in relation to collective licensing and HEIs, it can be concluded that in the present context, the existence of collecting societies did not have a significant effect on the ultimate decision.

This conclusion can be further strengthened with reference to the *Amstrad* case, which was brought by the trading arm of the music recording industry B.P.I. Whilst the collecting society representing C.B.S. Songs lost the case, the defendants, Amstrad, won it. This is an illustration of the fact that the existence of collecting societies does not provide an automatic protection to copyright owners. As such, the main point is that the mere renting, installing, owning or selling of technological equipment which has the potential to reproduce or even infringe copyright works does not make a user, such as an educational establishment or library, liable for copyright infringement, whether or not they have a valid licence with a collecting society.

PART C:
THE LAW, TECHNOLOGY, HEIs AND
COPYRIGHT COLLECTING SOCIETIES

**COPYRIGHT COLLECTING SOCIETIES:
AN ECONOMIC INSIGHT AND THEIR
SIGNIFICANCE IN THE
DIGITAL AGE**

CHAPTER 5

COPYRIGHT COLLECTING SOCIETIES: AN ECONOMIC INSIGHT AND THEIR SIGNIFICANCE IN THE DIGITAL AGE

Introduction

This chapter explores the important and relevant phenomenon of Copyright Collecting Societies (CCS). The aim of this chapter is to highlight two distinctive features relevant to CCS. The first characteristic of reduced transaction costs was one of the core reasons for the creation of CCS, apart from the aim to protect creative works of rights holders. The second characteristic is more of a drawback and represents the monopoly aspect of copyright administration relating to transaction costs. The monopoly aspect of copyright administration deals with the transaction costs that are attached to the trading of copyrights. Where copyright holders join together in a collective society with only one visit to each client they can negotiate all the copyright at once thereby saving on the costs of visits to each client. Furthermore, the monitoring costs and uses that are made of the copyright are proportionately reduced when many copyright holders act together. This has been the vital benefit behind the continued existence of CCS. This chapter will look into the monopoly nature surrounding transaction costs from an economic point of view. In doing so, it must be borne in mind that the monopoly aspect of transaction costs arises from the exclusive right of copyright itself. Therefore, the discussion will consider the monopoly aspect relating to copyright law first, before moving on to ascertain the concept of reduced transaction costs and the manner in which it has benefited CCS.

In considering copyright monopoly and its development throughout the years, the discussion will set out an introduction to copyright collecting societies from an economic point of view. The discussion will commence with a brief commentary on economic theorists before 1900 such as Adam Smith, Jeremy Bentham and Lord Macaulay who laid down some important concepts on the economics of copyright law. Thereafter, the discussion will proceed to consider theorists during the 20th century. The reason for going back in time to consider the various theories is to illustrate the manner in which the monopoly attached to copyright law

has evolved throughout the years and the manner in which it has been viewed: from being considered a 'harmless monopoly' to a 'public good with necessary costs'. Stemming from copyright monopoly, CCS are also viewed in the modern day as systems which are beneficial to the literary society, but which at the same time impose costs, particularly on users. Furthermore, this part of the discussion also aims to portray, briefly, the economic reasons why authors should be remunerated. The preceding chapters established that in an academic setting, authors should be remunerated, as opposed to the employer HEI or middleman publisher. This part of the discussion questions the reason(s) behind the remuneration and considers whether remuneration relates only to the economic right of copyright or whether it relates to the natural right of an author as well.

Following the discussion about the monopoly aspect of copyright protection, the discussion moves forward to the notion of copyright administration and transaction costs. The deliberation on transaction costs will begin generally and as such with an assessment of Coase's theorem before moving ahead to consider the application and benefit of reduced transaction costs as it applies to CCS. The chapter will also examine how CCS and the blanket licensing system, which they utilise, is more beneficial than the alternative compulsory licensing system. Whilst the concept of CCS appears to be economically efficient, the monopoly aspect arising from copyright has been less than successful. Therefore, the next part of this chapter will consider the model of competing collectives, and more, importantly will analyse whether having CCS, which compete with each other in the same field, could be a possible solution for HEIs in the UK, which have been dominated by the monopoly nature of the CCS in this field, i.e. the Copyright Licensing Agency. Addressing the monopoly position relating to CCS, which has also been the subject of a copyright tribunal case¹, the discussion will offer a competition model by looking in to the regulation of CCS and how they can be improved within the UK to assist institutions such as HEIs. The discussion will also proceed to consider the system in the USA where competitive models have proved to be successful, amidst a few shortcomings. The analysis will be carried out with the user HEIs in mind. Therefore, the reason for carrying out this analysis is simply to ascertain whether the existing system of a single and monopolistic CCS are more advantageous than one of competing collectives? The relevance to the thesis stems from the underlying question of whether 'authors are fairly remunerated through the system of CCS'. It is essential to establish whether the present system is the most efficient manner to

¹ *UUK v. CLA* [2002] R.P.C. (36), 693. Discussed in Chapter 6.

achieve this goal or whether rights holders (and users) would benefit from competing collectives.

As a final point, the chapter appraises the idea of reduced transaction costs in the digital age and questions its importance in a world dominated by the Internet. The discussion will also look at the recent developments of CCS in the European Union, which have been formulated in relation to the music industry. Whilst an in-depth consideration of developments in the music industry is not carried out, as it is not relevant to the thesis, some important points, which can be applied to the literary field have been considered. Particularly in relation to HEIs, the advent of e-learning and e-universities has thrown up new issues for CCS. It is submitted that by looking into the recent EU developments important lessons can be learnt. As such, the chapter will conclude with an analysis of the latest EU developments surrounding CCS in the digital era and their significance for HEIs.

Economic theory and copyright law before 1900

Four main economic theorists to write about copyright law and economics were Adam Smith², Jeremy Bentham³, John Stuart Mill⁴ and Henry Sidgwick⁵. Their approach was to use the tool of economics as providing further justification for copyright protection and not to question the natural rights foundation of literary property.

In relation to copyright law, in the years before 1900, a significant economic concept was that of economies of scale⁶. Economies of scale are prevalent within a firm (internal) or within an industry (external). They occur when mass production of goods results in lower average cost of producing individual goods. The advantage of the existence of economies of scale is that total costs are spread over a greater range of output. However, the drawback is that the producer has to sell a large quantity of the product, to recover not only the 'marginal costs' of production but also the 'fixed costs'. The marginal cost is the expenditure actually incurred by producing the 'next' unit of a product or service or the cost saved by not producing it. The fixed cost involves not only the costs incurred or saved in the production

² 1723-1790.

³ 1748-1832.

⁴ 1806-1873. For more on early writings of these economists, see Hadfield G. K., *The Economics of Copyright: An Historical Perspective* (1992) 38 *Copyright Law Symposium*, 1-46.

⁵ 1838-1900.

⁶ In the present day, the economic concept attached to publishing is the public goods issue.

scale, but also the appropriate proportion of ‘overheads’ within a period of time, irrespective of the level of activity or output. ‘Overheads’ include the capital that is needed to produce the goods, such as the firm’s or industry’s buildings, machines, other durable inputs etc. In this kind of scenario, a firm or industry will perceive itself to be doing better as long as the marginal benefit of the increase is greater than the marginal cost of the change. Where the marginal benefit equals or is greater than the marginal cost, then that level of production is the producer’s maximum⁷. Therefore a producer in a monopoly business would be very successful in such a situation while a producer who faced competition may be prevented or find it difficult to recoup his/her fixed costs depending on the nature of the business and the type of substitutes which are available on the market. As Gillian Hadfield, points out –

[The] economic rationale for copyright was at all times preserved as a subsidiary to the natural rights rationale; that is, it did not form the core of any arrangements for copyright but rather provided, it was believed, a compelling argument for why authors’ property rights were particularly vulnerable and in need of monopoly protection⁸.

However, what exactly is meant by ‘monopoly’ protection? As MacQueen and Peacock point out, ‘monopoly’ can have different meanings⁹. The definition can differ when looked at from the point of view of the right holder and from the point of view of the consumer/reader. MacQueen and Peacock draw a distinction between an author who is also the ‘sole supplier’ of his work, the product, and in this sense a monopolist in contrast to a consumer who will search for possible alternative products in the market and will not necessarily see the author who is also the sole supplier as a monopolist. Henry Sidgwick elaborated this argument in the following manner. Where the monopolist produces as well as sells the commodity, he will have to take into account the future loss likely to result to him by the rise in price and the rise in production beyond his control as a result of competitors entering the market¹⁰. On the other hand, the term ‘monopoly’ can be extended to include the case where it is in the power of a combination of buyers – or a single wealthy buyer – to control the price and

⁷ Cooter R., & Ulen T., *Law & Economics* 3rd ed., (Reading Massachusetts, Harlow England, Sydney, Madrid, Amsterdam: Addison-Wesley Longman, Inc.; 2000), Chapter 2, pp. 21-28.

⁸ *Op. cit.*, Hadfield G. K., n. 4 at p. 12.

⁹ MacQueen H., & Peacock A., Implementing Performers Rights (1995) 19(2) *Journal of Cultural Economics*, pp. 157-175 at p. 160.

¹⁰ Sidgwick H., *Principles of Political Economy* (3rd ed.) (London: Macmillan & Co. Ltd; 1901) chapter 10.

extent of sale of a certain commodity. This is known as a 'buyers' monopoly' and involves a single individual or a combination of buyers offering the only effective demand for a particular commodity, i.e. where no one else is willing to pay anything for it. In such a case the buyers' monopoly will exercise a control over the price.

During the 15th and 16th centuries, the monopoly structure in publishing continued, whilst monopolies in other industries were dismantled as the market economy developed. The main reason for a continued copyright monopoly can be explained by the underlying technology in the publishing industry whereas for most other industries the development of more structured markets in the 15th and 16th centuries reduced the level of uncertainty and fixed investments, hence eliminating the need for a monopoly structure to support their growth and development¹¹. The difference appears to lie in the fact that early copyright protection arose from large economies of scale in publishing (increased by high levels of uncertainty) rather than the 'public good' problem, which is the modern economic rationale for the protection of intellectual property. Contrary to economies of scale, when an input in the production of the good is 'public goods', not all the producers in the market have the same level of costs. In particular, the first producer who invests in the public good must usually pay for it, unlike the later producers who can simply acquire the public good at no cost or at a cost lower than that incurred by the first producer¹².

This same argument is true in relation to ideas and information, which in the context of copyright law can be viewed as a 'public good'. While the cost of creating a work subject to copyright protection – for example a book, movie, song etc., - is often high, the cost of reproducing the work is often low. Once copies are available to others, it is often inexpensive for these users to make additional copies. If the copies made by the creator of the work are priced at or around the marginal cost, others may be discouraged from making copies, but the creator's total revenues may not be sufficient to cover the cost of creating the work¹³.

¹¹ *Ibid.*, at p. 14.

¹² *Ibid.*, pp. 14-15.

¹³ For more about public goods, see, Landes W.M., Posner R.A., *An Economic Analysis of Copyright Law* (1989) *Journal of Legal Studies*, XVIII (2) June, p. 325 at p. 326; *op. cit.*, Cooter R. & Ulen T., n. 7 at pp. 42-44.

It can be established that copyright monopolies were necessary from an economic point of view. However, the question is: did the monopoly in the publishing industry and hence copyright law of that time prove harmful to the literary society?

Ordinary monopolies v. copyright monopolies

The aim and relevance of this section is to consider whether the monopoly aspect attached to copyright law was seen as harmless by economic theorists such as Adam Smith, Jeremy Bentham, Lord Macaulay and Henry Sidgwick and as such a necessary mode to reward right holders or whether it was seen as a 'tax' on readers. By discussing the various theories before and after 1900, the aim is also to assist the reader to understand *why* a copyright monopoly was necessary and *how* it was achieved in the market place.

However, before considering the theories, it is important to clarify what is meant by an ordinary, natural or *de facto* monopoly. A *de facto* or a natural monopoly arises when market behaviour makes it inefficient to have more than one producer, thereby making it almost impossible for smaller firms to enter the market, without facing the risk of high loss. In such a situation, one firm controlled by a single producer thrives in the market, . Such natural monopolies reflect the important characteristic of decreasing average costs. The theory of decreasing average costs implies that the more of a given total amount of production that is concentrated in one producer, the lower the total costs required to produce the aggregate amount in question. As such in the case of a natural monopoly, the least expensive manner in which a particular aggregate production can be made available to society is if only one producer exists¹⁴. This has been the thinking behind the making of CCS and the monopoly situation which has arisen from it.

Early Days: Adam Smith – copyright is a harmless monopoly

For early economists 'competition was an institutional assumption rather than the result of certain market conditions'¹⁵, and as a result they did not feel the need to analyse its logical content. This had two effects in the study of copyright in the context of economics. They were –

¹⁴ Watt R., *Copyright and Economics: Friends or Foes* (Cheltenham UK, Northampton MA USA; Edward Elgar Publishing; 2003) pp. 163-165.

¹⁵ Schumpeter J.A., *History of Economic Analysis* (London: Oxford University Press; 1996), p. 150.

- (1) Monopoly was seen as being the product of state interference in the functioning of the naturally competitive market;
- (2) Since the unfettered economy was assumed to be perfectly competitive, the problem brought about by economies of scale appeared particularly severe.

This line of thinking was analysed first by Adam Smith who argued that monopoly is justified only when the harm done by the monopoly is outweighed by the benefit. Smith went on to say that the 'benefit' in this context arises from the correction of failure in the markets for socially valuable goods where the 'failure' has arisen as a result of the absence of economies of scale and the consequent difficulty of recovering large fixed investments, which calls for government interference. In relation to his argument, Smith made reference to copyright in his most famous book, the *Wealth of Nations*, by stating –

A temporary monopoly of this kind may be vindicated upon the same principles upon which a like monopoly of a new machine is granted to its inventor, and that of a new book to its author¹⁶.

Smith was careful to distinguish the exclusive rights, of which copyright was an example, from other forms of property such as servitude, pledge, haereditas or inheritance. Referring to these exclusive rights and in particular to the civil constitutions of the country, Smith went on to say that 'these are greatly prejudicial to society'¹⁷. However, referring to intellectual property rights and, in the present context copyright he established that it was 'harmless enough'. Smith argued –

Now suppose that a man had wrote a book and had lent it to another who took a copy of it, and that he afterwards sold this copy to a third; would there be here any reason to think the writer was injured. I can see none, and the same must hold equally with regard to printing. The only benefit one would have by writing a book, from the natural laws of reason, would be that he would have the first of the market and may be thereby a considerable gainer. The law has however granted him an exclusive priviledge [sic] for 14 years, as an encouragement to the labours of learned men. And this is perhaps as well adapted to the real value of the work as

¹⁶ Smith A., *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 2 (Oxford: Clarendon Press; 1976), p. 754.

¹⁷ Smith A., *Lectures on Jurisprudence* (Oxford: Clarendon Press; 1976) Report 1762-3, ii 31-34, pp. 82-83.

any other, for if the book be a valuable one the demand for it in that time will probably be a considerable addition to his fortune. But if it is of no value the advantage he can reap from it will be very small. These . . . priviledges [sic] therefore, as they can do no harm and may do some good, are not altogether to be condemned. But there are few so harmless¹⁸.

As such, one of Smith's strongest arguments was that, unlike ordinary monopoly, the copyright monopoly is harmless and because it is harmless, any harm could not outweigh the benefits brought about by such a monopoly. Smith does not say why copyright monopoly has this special characteristic as opposed to ordinary monopoly. The only reason he gives is that because 'it is a proper and adequate reward for merit' it 'has not so bad a tendency as the ordinary monopoly',¹⁹.

Yet again, he does not explain why an encouragement is necessary for the author or how the 'adequate reward for merit' will work in favour of the author. Importantly, Smith does not take in to account the risk taken by an author in the investment of writing a book not knowing whether it will produce a valuable good and thus earn a high reward or whether he will reap no reward from his project. Such important questions were left unanswered by Smith.

Although Smith's line of thinking did not amount to a pure economic argument at that time, later economists such as Jeremy Bentham²⁰, John Stuart Mill²¹, and Henry Sidgwick²² continued to assert and agree with Smith that while ordinary monopolies could lead to some harm, copyright monopolies are harmless.

Answering the unanswered: Jeremy Bentham – copyright as a reward system

Jeremy Bentham focused on the public good aspect of differential fixed costs as opposed to the economies of scale, which was the focus of Smith's argument. This led Bentham to

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ See generally, Mill J.S. & Bentham J., *Utilitarianism and Other Essays* (England, London: Penguin Group; 1987), pp. 132-177.

²¹ See generally, Mill J.S., *Essays on Economics and Society* (1824-1845), vol. IV (London: Routledge & Kegan Paul; 1967), pp. 309-339.

²² See generally, *op. cit.*, Sidgwick H. n. 10.

consider the incentives available to authors and inventors; the important aspect which Smith had failed to analyse. In elaborating on the incentive argument, Bentham emphasised –

What is the effect of a patent? In respect of things, to cause that to be produced which, had it not been for this security given to the fruits of industry, would not have been produced: and thence in respect to persons, at the expiration of the term at least, to cause him to produce the thing, who, had it not been for the invention thus brought to light, could never have produced it²³.

Bentham illustrated that copyright has to be supported by an incentive because creating a copyright work is often time-consuming and an expensive business, but once a work has been created it can usually be reproduced quickly and cheaply. In the absence of copyright protection, others would be tempted to free ride²⁴. However Bentham's argument also appears to be flawed. In a pure economic sense, the incentive argument follows the thinking

That it is not the recovery of 'the fruit of one's labour' that causes the individual to undertake an investment but rather the recovery of enough of the fruit to provide an adequate return on that investment²⁵.

Challenging Smith: Lord Macaulay – copyright, may be a bounty to writers but is a burdensome tax on readers

One of the economists of this time to have truly challenged Smith's argument, but partially concurred with Bentham, was Lord Macaulay. He went on to say that –

The advantages arising from a system of copyright are obvious. It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of remunerating them is by means of copyright . . . Copyright is a monopoly and produces all the effects which the general voice of mankind attributes to monopoly . . .²⁶

²³ Stark W., *Jeremy Bentham's Economic Writings* vol. 1 (London: George Allen & Unwin Ltd; 1952), p. 264.

²⁴ *Ibid.* See also, Burrell R. & Coleman A., *Copyright Exceptions: The Digital Impact* (Cambridge, England: Cambridge University Press; 2005) for more on the incentive argument at pp. 170-173; 176-177; 178.

²⁵ *Op. Cit.*, Hadfield G., n. 4 at p. 27.

²⁶ 1800-1859. Macaulay T.B., *Speeches on Politics and Literature* (1841) at p. 182.

Lord Macaulay even went on to set out the modern economic rationale for copyright in the 1830's and showed that he had a better idea of economics and intellectual property than many other economists of his time. He stated –

The principle of copyright is this. It is a tax on readers for the purposes of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures. I admit, however, the necessity of giving a bounty to genius and learning. In order to give such a bounty, I willingly submit even to this severe and burdensome tax²⁷.

Following on from Lord Macaulay of Babington, it was left to Henry Sidgwick in the latter years of the 19th century to make it clear why copyright monopoly was harmless.

Taking the Middle-Path: Henry Sidgwick – copyright is not special

Sidgwick simply said that the copyright monopoly was harmless because it exists over an object that the world would otherwise not have had. As such, his reasoning was similar to that of Smith, with an express condition attached to the theory of 'harmless monopoly'. Sidgwick pointed out that copyright is beneficial and of use only if the public 'want' the product; in other words Sidgwick stressed that the reward element associated with copyright is commensurate with public demand²⁸. However, Sidgwick was one of the first economists to have recognised that the fact the copyright monopoly is harmless and therefore ultimately beneficial does not mean that it is not costly when measured in terms of the criterion of consumer wealth²⁹. In explaining his argument, Sidgwick distinguished between producers' wealth such as agricultural lands, mines, factories, and machines and consumers' wealth, which includes food, clothes, houses, and furniture³⁰. He also flagged up the important difference between a nation's stock of consumers' wealth and what Adam Smith referred to as the 'conveniences of life'. He said that in considering a nation's command over the conveniences of life, it is also important to take into account not only the food that is eaten from day to day and the clothes worn but also the houses, well-made furniture, pictures,

²⁷ *Ibid.*, at p. 177.

²⁸ *Op. cit.*, Sidgwick H., n. 10 at p. 78.

²⁹ *Op. cit.*, Macaulay T.B., n. 26 at p. 83.

³⁰ *Op. cit.*, Sidgwick H., n. 10 at chapter 3 'wealth'.

jewels, ornaments, that are handed down from generation to generation³¹. This stock of wealth will require continual expenditure of labour in care and repairs, but also continual adaptation as well. What he attempted to illustrate through these distinctions was that there are other immaterial things which are permanent sources of utility and therefore lead to expenditure. He explained his argument as follows –

A man can buy the plays of Shakespeare for 3*s.* 6*d.* or less; but he cannot buy the capacity for enjoying Shakespeare without a vastly greater expenditure of his own and others' labour other than 3*s.* 6*d.* would remunerate. Are we not then, it may be asked, to regard this culture when acquired, as wealth, as much as the less important source of utility which we possess in the three-and-sixpenny volume? Certainly the facts just indicated should not be overlooked by the economist; it should be borne in mind that the expenditure of wealth and labour in producing culture is an indispensable condition of realising the most important part of the utilities which we commonly but imperfectly conceive as attached to the material things that we call luxuries³².

As such, Sidgwick pointed out that as far as copyright is concerned, the face value of a literary work does not accurately reflect the greater wealth attached to it. To re-iterate, a user cannot buy 'time capacity' for enjoying Shakespeare for 3*s.* 6*d.*; it will cost much more to him. The user would have had to invest in a number of copies of Shakespeare, time spent in appreciation to benefit from Shakespeare's works. For the creator, on the contrary, a large amount of expenditure in terms of labour and time would have been spent to create a single literary work – which undoubtedly will total to more than 3*s.* 6*d.* Investing in the works of Shakespeare, the time spent enjoying such works by a user may be immaterial to the actual price of one book, but as Sidgwick pointed out, they form part of the permanent sources of utility and therefore expenditure.

Therefore, looking at copyright law from the vantage point of economics in the years before 1900, it can be seen that the face of the monopolistic nature of copyright law changed from being considered as 'harmless' as established by Smith to a harmful and burdensome tax for readers as argued by Lord Macaulay, to the eradication of the view that copyright monopoly is somehow special as established by Sidgwick. Therefore, one of the reasons for shying

³¹ *Ibid.*, p. 87.

³² *Ibid.*, p. 90.

away from Smith's arguments of copyright as a harmless monopoly was based on the fact that the monopoly aspect of copyright was seen as a deterrent for the user and therefore for literary development of a society. Relating this argument to copyright administration and the monopoly aspect attached to transaction costs, the same is true as CCS places much power in the hands of rights holders. The rights holders enjoy a position of monopoly power in negotiating licences with users, who in turn are faced with the prospect of the lack of competition and therefore choice, in the respective fields of intellectual property.

The economic theorists of the 20th century took a different view to those of the earlier period, and set out a more balanced view on the monopolistic nature of copyright.

Economic theory and copyright law in the 20th century

The main economic theorists of the 20th century were Sir Arnold Plant, Robert Hurt, Robert Schuchmann, Stephen Breyer, Ian E. Novos, Michael Waldman, William R. Johnson, William L. Landes and Richard A. Posner. For the purposes of this chapter, and for the sake of relevance, emphasis will be placed on the theories of Sir Arnold Plant and Landes and Posner from the early and latter years of the 20th century respectively.

Whilst the main focus will be to consider the manner in which the 20th century economists developed the concept of copyright monopoly, an underlying premise for examining these theories is to highlight and distinguish between an author's natural right, i.e. moral rights, and their economic right, i.e. royalties, borne through the medium of a monopolistic market. In considering authors' rights and the issue of remuneration leading to royalties, chapter 3 already looked at *who* should be remunerated for literary contributions in an academic setting: the employee author, the employer HEI or the middleman publisher? Chapter 3, concurring with Gadd, Oppenheim and Proberts, established the arguments in favour of remunerating the academic author, although the position in the UK is yet not very clear. This part of the chapter looks at the economic reasons behind why an author is remunerated; in other words the reward or incentive system.

However, away from the economic right, it must also be understood that authors, and particularly, academic authors seek the protection of a natural right, as the incentive for such authors arises through reputation in the academic field, promotion and therefore higher salaries. For example, it is common knowledge that within an educational establishment the criteria, amongst others, for a professional promotion are reliant upon the number of research publications produced by an academic. As such, a question which can be raised at this point

is whether the natural and economic rights are intrinsically linked to copyright of the author? The present writer answers this question in the affirmative and points out that the economic and natural rights of copyright reflect the direct and indirect returns to the author. For example without natural rights protection an author will not have control over his/her work, which will result in an indirect financial loss. Landes and Posner, however, take the view that natural or moral rights do not, in fact, benefit authors. Such rights are normally said to be of most value between the author and future assignees of copyright³³. However, Burrell & Coleman analysing this view many years later, qualified the statement made by Landes and Posner –

Implicit in this analysis, however, is that [natural right] [sic] control is and ought to be monetisable, and there is nothing to choose between a world in which authors receive greater remuneration but lose all control over how their work is exploited or a world in which authors receive less payment but retain a degree of artistic control. But once we abandon the narrow set of values on which traditional law and economics rests, we can see that there might be good reasons for preferring the latter state of affairs³⁴.

As such, it can be seen that both natural and economic rights are important, although in terms of financial remuneration, natural rights represent an indirect return as pointed out above. Ultimately, what can be seen is that there are other ways of generating ‘incentives’ and that creative works are created sometimes for non-economic reasons. Based on this thinking it can be established that it is the ‘incentive’ factor, whether direct or indirect, which is most important. The next part of this chapter will focus on the incentive argument as the fundamental basis for literary creation – as discussed by Sir Arnold Plant and Landes and Posner.

Sir Arnold Plant

One of the most celebrated of copyright economists, Sir Arnold Plant questioned the assertion that whether for reasons of economies of scale or public good appropriation, authors would be under-compensated in the recovery of their investment because competition would cause prices and authors returns to fall to a level covering only their

³³ Landes W.M., Posner R.A., *The Economic Structure of Intellectual Property Law* (Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press; 2003), pp. 287-291.

³⁴ *Op. cit.*, Burrell R. & Coleman A., n. 24 at p. 175.

ongoing marginal costs³⁵. The essence of Plant's argument was that in the absence of copyright protection or government interference (i.e. granting a monopoly) authors would not earn sufficient returns to justify their endeavour.

He justified his argument by pointing out that a large number of authors do write for their living and therefore their remuneration will depend on the number of copies sold. If copyright protection did not exist, then the purchase of a copy would not create the need for a further copy to be reprinted, resulting in the right holder losing out. In a copyright-free world, the solution to this problem would be for the author and publisher to restrict the number of copies offered on the market by the simple device of monopoly power or attempting to control the supply of competing books. By using market forces, the author and publisher can ensure that the number of copies sold could be kept to a satisfactory number. However, it can be questioned whether this is always a satisfactory solution to the right holder and publisher.

Plant then examined other alternatives in the absence of copyright protection³⁶ and revealed that market forces are an important factor for an author attempting to earn a sufficient return from his/her published works. This point is re-iterated by reference to the years before 1876-1878, which sometimes led to English authors receiving more from their sale of books through American publishers. Despite the absence of US copyright protection, throughout the 19th century, the easiest way for a British author to secure American copyright protection was to have an American citizen serve as a collaborator in the publishing process, then have the book registered in Washington D.C., under the collaborator's name. This system continued until the introduction of the *Chace Act 1891*³⁷. In the USA, it was understood amongst publishers that they should not pirate books, and they notified each other of their arrangements³⁸. As such, Plant recognised and developed the argument of the choices facing competing publishers: whether to compete directly by publishing an identical edition or to produce a slightly differentiated cheaper edition, thus leaving all publishers with a small range of monopoly power. Choosing the second option meant that [Americans] enjoyed

³⁵ This was one of the main arguments, which was posed by Arnold Plant in his article, Plant A., The Economic Aspects of Copyright in Books (1934) (1) May, *Economica* (new series) 167-195.

³⁶ *Ibid.*, pp. 170-175.

³⁷ *Ibid.*, p. 172.

³⁸ *Ibid.*, p. 173. If another house did publish it would be a cheaper edition and this led to "fighting-editions".

cheap books, their publishers made profits from their businesses and [English] authors received lump sums for their advance sheets and royalties on American sales³⁹.

Plant attempted to illustrate that in a competitive market as we have today, which is far removed from the theoretical concept of 'perfect competition', protection or government interference is necessary to ensure that authors earn sufficient returns to justify their endeavour. Ultimately as Plant stated –

Copyright cannot create demand, it can only make it possible to monopolise such demand as already exists⁴⁰.

It is interesting to note the manner in which Plant argued for the significance of the economic importance of copyright law. Therefore, unlike his predecessors who first considered copyright as harmless and then as a tax to the reader, Plant considered copyright as a necessity. He said –

More authors write books because copyright exists, and a greater variety of books is published; but there are fewer copies of the books which people want to read. Whether successful authors write more books than they otherwise would is a question of 'the elasticity of their demand for income in terms of effort' – they may prefer now to take more holidays or retire earlier. Some of them are in any case well advised to write different books instead of writing what they would otherwise want to say or have to say, they find it more remunerative to write the sort of thing for which the demand conditions are most appropriate for ensuring the maximum monopoly profit⁴¹.

In essence, Plant illustrated the benefits of a copyright monopoly to an author and highlighted the drawbacks which authors would face in the absence of it. Plant viewed the economic right of a copyright monopoly as a necessity to keep the wheel of literary development turning.

³⁹ *Ibid.*, p. 177.

⁴⁰ *Ibid.*, p. 171.

⁴¹ *Ibid.*, p. 192.

Landes and Posner – the breakthrough in the 1970's

Landes and Posner, whilst concentrating on the 'economic theory of property', looked into the trade-off between "incentive" and "access" which in turn led to the important assessment of benefits and costs of the protection of copyright law. The underlying premise of the 'incentive' theory is that a work will only be created if the expected revenues exceed the cost of expression and the cost of making and distributing copies. In addition, the price of a successful work must compensate for the risk of failure⁴².

As such, Landes and Posner consolidated the theories of Smith, Macaulay, Plant, Novos and Waldman, and rather than brand copyright law as a harmless monopoly, a burdensome tax on readers, or an economic necessity, they showed that it can have both economic benefits and costs. In other words, Landes and Posner illustrated copyright law as an economic good with necessary costs. They elaborated on this point with reference to the 'public good' argument and stated that copyright protection – the right of the copyright owner to prevent others from making copies – trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law. For copyright law to be economically efficient – an 'economic good' – it must maximize the benefits from creating additional works and minimise the losses from limiting access and the costs of administering copyright protection – reflecting necessary costs⁴³.

Generally, the economic benefits associated with copyright law are two-fold, namely (1) the right to exclude (static) and (2) the right to a reward system (dynamic)⁴⁴, whilst the economic costs are three-fold – (1) transaction costs; (2) rent-seeking; and (3) costs of protection. The benefits of right to exclude through a system of monopoly and the right to a reward system through the system of incentive have already been discussed. The chapter will now focus on one of the costs – transaction costs – which has actually been viewed as a 'benefit' in the setting up of a collecting society. Before examining transaction costs in detail, a précis on the other two types of costs has been set out. In relation to costs, it must be pointed out that costs have to be borne by the author and publisher based on future market predictions about the nature of the demand for the book. Therefore, the decision on whether to create the work

⁴² *Op. cit.*, Landes W. M. & Posner R. A., n. 33 p. 325.

⁴³ *Ibid.*, at p. 326.

⁴⁴ *See op. cit.*, Landes W. M. & Posner R. A., n. 13 pp. 12-16; Also, *op. cit.*, Landes W. M. & Posner R. A., n. 33 pp. 325-63.

will ultimately be confirmed only if the difference between expected revenue and the cost of making copies equals or exceeds the cost of expression.

Economic costs of copyright

(1) Rent-seeking – economic rent is a return over and above the cost of generating the return. As such, it is worth incurring costs (such as costs of expression, protection etc) to obtain this pure economic rent, even if the costs exceed the social benefit from the undertaking, as they will often do. The legal protection of intellectual property gives rise to serious problems of rent-seeking because intellectual goods are waiting to be discovered or invented. This can be explained by rent-seeking behavior, which is distinguished in theory from *profit-seeking* behavior, in which entities seek to extract value by engaging in mutually beneficial transactions

(2) Cost of protection – this kind of cost includes not only the enforcement costs incurred by police, property owners and courts in enforcement against trespass and theft but also the cost of a fence used to mark boundary lines, such as the boundary on “access” to copyright works. In some cases the total cost could exceed the benefit and this is especially so in the case of intellectual property. Investments may not seem desirable if the creators of intellectual property cannot recoup their sunk costs.

(3) Transaction costs – transaction costs are generally high in intellectual property, because it is difficult to identify such property, as it has no ‘unique physical site’. This means that, for example, the right to property in a picture could be photographed or copied and affixed to a t-shirt, mug or mouse-mat thus making its unique physical site more complex than in the case of other types of property. The transaction costs of intellectual property arise not in the sale of the original but in the transfer of interests in the creative work itself. Transaction costs can be seen where the copyright holder wishes to transfer the copyright only for a limited time period (rights have been ‘rented’) and/or where the copyright holders wishes to transfer part of the total copyright i.e. the right to produce a film version of the book but not the right to produce children’s toys of the characters in the book.

The next part of the chapter will commence by looking at the concept of transaction costs, in detail, from an economic and general point of view, with particular emphasis on the Coase theorem. The Coase theorem looks at the importance of transactions and the costs involved with it. Thereafter, the chapter will move on to consider the concept of transaction costs in the context of CCS before questioning whether CCS created to lower transaction costs are economically efficient. Based on the concept of economies of scale, as these societies represent mutual membership (spreading the risk between authors and publishers) under the

umbrella of rights administration, economists tend to accept the transaction cost rationale as a remedy to market failure for the rights representational element of collecting societies⁴⁵. 'From an economic point of view, collecting societies are the perfect mechanism by which to rectify the possible economic harm suffered by authors and publishers'⁴⁶. The relevance of this discussion is also to illustrate lower transaction costs as an underlying success and an important factor for the survival of CCS in the present day.

A general introduction into the concept of transaction costs: The Coase Theorem

The most obvious starting point when considering transaction costs is the Coase theorem also known as the legal entitlement theory. The theorem named after its progenitor Ronald H. Coase, looks at how rights are protected rather than whether they are protected. Coase said that the importance in transactions lies in efficiency over and above their cause and fairness. He elaborated his theory with the following example –

...There is no difference, analytically, between rights such as those to determine how a piece of land should be used and those, for example, which enable someone in a given location to emit smoke. Just as the possession of the right to build a factory on a piece of land normally gives the owner the right not to build on that site, so the right to emit smoke at a given site can be used to stop smoke being emitted from that site (by not exercising the right and not transferring it to someone else who will). How the rights will be used depends on who owns the rights and the contractual arrangements into which the owner has entered. If these arrangements are the result of market transactions, they will tend to lead to the rights being used in the way which is most valued, but only after deducting the costs involved in making these transactions. Transaction costs therefore play a crucial role in determining how rights will be used⁴⁷.

Therefore Coase established the importance of transaction costs in considering the efficiency of contractual arrangements. He then went on to illustrate the benefits of zero transaction costs using an example about ranchers and farmers. Coase argued –

⁴⁵ Kretschmer M., Copyright societies do not administer individual property rights: the incoherence of institutional traditions in Germany and UK in Towse R., *Copyright in the Cultural Industries* (Cheltenham UK, Massachusetts USA; Edward Elgar Publishing: 2002) pp. 140-164.

⁴⁶ Suthersanen U., Copyright and Education Policies: A Stakeholder Analysis [2003] 4 *Oxford Journal of Legal Studies* pp. 586-610.

⁴⁷ Coase R. H., *The Firm, the Market and the Law* (Chicago, London: The University of Chicago Press; 1988) pp. 97-102.

...That if transaction costs were assumed to be zero and the rights of the various parties well defined, the allocation of resources would be the same ... if the cattle-raiser had to pay to the crop-former the value of the damage caused by his cattle, he would obviously include this in his costs. But if the cattle-raiser were not liable for damage, the crop-farmer would be willing to pay (up to) the value of the damage to induce the cattle raiser to stop it, so that for the cattle-raiser to continue his operations and bring about this crop damage would mean foregoing this sum, which would therefore become a cost of continuing to raise cattle. The damage imposes the same cost in the cattle-raiser in both situations... the ultimate result (which maximises the value of production) is independent of the legal system if the pricing system is assumed to work without cost⁴⁸.

Coase also went on to say that this result is achieved through co-operative bargaining, which is in direct contrast to the rule of law, which is applied without co-operation or negotiation between the parties. In his paper, titled 'The Problem of Social Cost' Coase explained that in the absence of transaction costs, it does not matter what the law is, since people can always negotiate without cost to acquire, subdivide and combine rights whenever this would increase the value of production⁴⁹. The parties through their negotiations will adjust rights until the optimal allocation of legal entitlement⁵⁰ is reached. Coase used the term 'transaction costs' to refer to all costs which were an impediment to bargaining. Based on this thinking, Coase re-iterated that bargaining will succeed when transaction costs are zero.

With zero transaction costs, producers would make whatever set of contractual arrangements was necessary to maximize the value of production. If there were actions that could be taken which cost less than the reduction in damage that they would bring, and they were the least costly means available to accomplish such a reduction, they would be undertaken... However once transaction costs are taken in to account, many of these measures will not be undertaken because making the

⁴⁸ *Ibid.*, at pp. 13-14.

⁴⁹ *Ibid.*, at p. 14.

⁵⁰ A property rule is a legal entitlement that can only be infringed after bargaining with the entitlement holder. This is in contrast to the liability rule, which one may infringe first and a tribunal will determine the appropriate compensation in an ex-post proceeding. *Also see*, Merges R. P., Symposium: Towards a Third Intellectual Property Paradigm: Comments: Of Property Rules, Coase and Intellectual Property (1994) *Columbia Law Review* 2655-2673; Koboldt C., Intellectual Property and Optimal Copyright Protection (1995) 13 *Journal of Cultural Economics*, pp. 131- 155.

contractual arrangements necessary to bring them into existence would cost more than the gain they make possible⁵¹.

As such, Coase illustrated the benefits of zero transaction costs. However, in the case of CCS in the analogue age it is almost impossible to avoid transaction costs and zero transaction costs simply will not work in practice. Yet, Coase's illustration is reflective of the clear fact that the lower the transaction costs are, the more effective the contractual arrangements can be. The question then is how to keep these transaction costs to a minimum, not only in situations outside the domain of the law but even within the legal system, where the transaction costs are positive. The Normative Coase theorem⁵² addresses the problem of positive transaction costs where the character of the law becomes one of the main factors determining the performance of the transaction. The Normative Coase theorem suggests that the law can encourage bargaining by lowering transaction costs. Lowering transaction costs 'lubricates' bargaining, and defining simple and clear property rights can do this. This type of bargaining within the legal domain has been formalised as 'normative' because it offers guidance to lawmakers: as 'normative' means tending to create or prescribe standards. The principle was inspired by the Coase theorem because it assumes that private exchange can allocate legal rights efficiently, with the aid of simple and clear property rights. Another means of lowering transaction costs within the legal domain was brought to the forefront by the Normative Hobbes theorem named after Thomas Hobbes⁵³. This theorem ensures that disagreements and failures to co-operate are kept to a minimum. Hobbes looked at how the law could be structured so as to minimise the harm caused by failures in private agreements. Thomas Hobbes said that to minimise harm the law should allocate property rights to the party who values it the most. By allocating property rights to the party who values them the most, the law makes exchange of rights unnecessary and thus saves the cost of re-allocation and hence a transaction⁵⁴.

Although the various theorems illustrated the benefits which can be reaped by parties wanting to lower transaction costs in copyright administration, the Coase theorem and its offshoots have come under criticism for the lack of their significance in practice. It is true

⁵¹ Coase R. H., *Essays on Economics and Economists* (Chicago, London: The University of Chicago Press, Ltd.; 1994) at p. 175.

⁵² *Op. cit.*, Cooter R., & Ulen T., n. 7 at pp. 93-94.

⁵³ Bart, W. M., (ed.) *The Collected Works of Thomas Hobbes* vol. IV (London: Routledge Thoemmes Press; 1994). Also see, Robertson G. C., *Hobbes* (Edinburgh: William Blackwood & Sons; 1929).

⁵⁴ *Ibid.*

that clear property rights and avoidance of disagreements and failures can lower transaction costs in private agreements, which are also directly applicable to the functioning of CCS. However, zero transaction costs appear to be a matter of fiction rather than fact in the world of contract, and the reasons for arriving at this conclusion has been set out below.

Criticisms of the Coase theorem

George J. Stigler, who carried out an in-depth study of the Coase theorem, said: 'The world of zero transaction costs turns out to be as strange as the physical world would be without friction'⁵⁵. As such, Coase's theory has been reviewed and criticised for a number of reasons. First, Guido Calabresi⁵⁶ together with Douglas Melamed argued that Coasian bargaining assumes that the parties will divide equitably rather than fight over the cooperative surplus to be gained via the bargain. This appears to be idealistic and unrealistic, and Calabresi highlighted that the weakness of Coase's theory lies in the unrealistic assumption of absence of costs in process of negotiation and transfer of rights. Coase uses tools of static analysis, which ignore possible disequilibria, which may occur subsequent to the negotiation as illustrated below –

Suppose car-pedestrian accident currently costs \$100. Suppose also that if cars had spongy bumpers the total accident costs would only be \$10. Suppose finally that spongy bumpers cost \$50 more than the present bumpers. Assuming absence of costs in the process of negotiation (which is the case under the Coasian bargaining), spongy bumpers would become established regardless of who was held responsible for car-pedestrian accidents. If car manufacturers were liable they would prefer to spend \$50 for the new bumpers plus \$10 in accident damages, instead of \$100 for accident damages. If pedestrians were held responsible and could foresee the costs, they would prefer to 'bribe' the car manufacturers \$50 to put in spongy bumpers and bear \$10 in damages, rather than bear \$100 in damages⁵⁷.

In this scenario, the parties divide equitably and the result will remain the same. This kind of scenario ignores the possibility of transaction costs that may accrue in the bargaining process and also does not seek the cheapest option for the parties. The same example with the

⁵⁵ Stigler G. J., *The Law and Economics of Public Policy: A Plea to the Scholars*, (1972) vol. 1 *Journal of Legal Studies*, p. 12.

⁵⁶ Calabresi G., *The Costs of Accidents: A Legal and Economic Analysis* (New Haven & London: Yale University Press; 1970), chapter 7; see also, Paresi F., 'Coase theorem and transaction cost economics in the law' in Backhaus Jurgen G., *The Elgar Companion to Law and Economics* (Cheltenham UK, Northampton, MA, USA: Edward Elgar Publishing; 1999) chapter 1.

⁵⁷ *Ibid.*, Calabresi G., at p. 136.

addition of transaction costs (as proposed by Calabresi) can be used to illustrate this argument further.

Assume that any allocation other than leaving the cost where it falls (i.e. on the pedestrian) entails \$5 in administrative costs. Assume also that for pedestrians to 'bribe' anyone is very expensive, e.g. \$65. (This is because it is costly to gather pedestrians together to bargain). If car manufactures were held liable, they would bear \$100 in accident costs plus perhaps \$5 allocation cost. They could avoid this in the future by putting spongy bumpers at \$50, paying \$10 in damages and, and perhaps the same \$5 administrative costs. Clearly they would install spongy bumpers. If pedestrians were held liable, they would bear \$100 in accident costs. But to get spongy bumpers installed would cost them \$50 in 'bribe' plus \$65 in transaction costs and they would still bear \$10 in accident costs. Since \$125 is more than \$100, a change to spongy bumpers would not seem worth the expense. But the absence of spongy bumpers would in fact entail an unnecessary cost to society of the difference between \$100 (accident costs when borne by pedestrians) and \$65 (the cost to society when car manufacturers are held liable)⁵⁸.

Calabresi attempted to illustrate that by taking into account transaction costs in the process of bargaining the results would not be the same for everyone, but that it would seek the cheapest way of meeting the costs for one of the parties involved in the bargaining process. Based on the same line of thinking in case of CCS the rights holders benefit from the cheapest way of meeting the costs by acting together collectively in the bargaining process. According to the Coase theorem, to divide equitably or to avoid costs completely (zero transaction costs) in process of negotiation and transfer of rights is unrealistic.

Furthermore, Calabresi illustrated that his model is more realistic in the practical sense. Keeping in step with reality, Calabresi also pointed out possible shortcomings in his theory⁵⁹. For example, Calabresi recognised that the first guideline for picking the cheapest cost avoider is to seek the optimal relationship between avoidance costs and administrative costs. This means that if finding the cheapest cost avoider is very expensive, it may lower total costs to allocate costs to a slightly more expensive costs avoider. As such, any cost savings achieved by the seemingly better allocation may not be worth the costs borne to find it. Finally, Calabresi identified that market forces work in such a way that a tendency exists for

⁵⁸ *Ibid.*, p. 137.

⁵⁹ *Ibid.*, at pp. 140-160.

the market to find the cheapest cost avoider. This leads to the conclusion that there is always an uncertainty of who the cheapest cost avoider is, to charge accident costs to that loss bearer who can enter in to transactions most cheaply.

Landes and Posner⁶⁰ and Robert P. Merges⁶¹, in agreement with Calabresi, highlighted the drawbacks relating to the distribution of resources. According to their criticism, to affirm that, in the absence of transaction costs, the final allocation of resources will be efficient in no way implied the absence of transfers of wealth brought about by the changed legal rule. The third group of critics observed that an idea of a transaction without cost is 'a logical fiction rather than a real possibility and that by unveiling such a fiction the theorem remains a mere tautology'⁶².

Also, surprisingly, Coase himself later recognised that transaction costs can never be zero and that sometimes bargaining can succeed whilst at other times it can fail. This is because bargaining also carries costs such as hiring a conference room, gathering people, spending time communicating etc⁶³. As such, Coase identified three elements of the costs of exchange.

- (1) Search costs – these costs will be high for unique goods such as an antique sofa and low for standardized goods or services such as fruit and vegetables.
- (2) Bargaining costs – where the information is private, where the bargain includes three or more parties or where an agreement has to be drafted the bargaining costs will be high. On the contrary, these costs will be low where the information is public, rights are clear and the bargain is between two parties.
- (3) Enforcement costs – transactions which are complex such as monitoring behaviour would be high whereas an agreement that takes no time to fulfil, such as buying a can of Coke would be low as I would give you £1 and you would give me the can of coke in exchange.

⁶⁰ *Op. cit.*, Landes W. M & Posner R. A., n. 33 chapter 3.

⁶¹ Merges R. P., Contracting in to Liability rules: Intellectual Property Rights and Collective Rights Organisations (1996) 84 *California Law Review*, pp. 1293-1386.

⁶² *Op. cit.*, Cooter R. & Ulen T., p. n. 7 p. 14. Especially Cooter who drew an analogy to Coase's theorem: a plane with no air resistance in physics.

⁶³ *Op. cit.*, Cooter R., & Ulen T., n. 7 chapter 4.

In drawing a conclusion on the drawbacks of the Coase theorem, it is clear that bargaining between parties in order to reach an optimal allocation of resources will be most efficient when transaction costs are zero. However, in reality and as Coase accepted, transaction costs can sometimes be positive/high whilst at other times they can be low due to a variety of reasons. Where the transaction costs are positive, as in the legal domain, law can encourage bargaining by lowering transaction costs, which is possible if property rights are clear and simple as was established by the normative Coase theorem. Ultimately, whether relying on the pure Coase theorem, the normative Coase theorem, or the models of Calabresi or Melamed there is simply just one clear conclusion in relation to the present context of CCS – co-operative bargaining reduces transaction costs resulting in an efficient allocation of resources.

Transaction costs and Copyright Collecting Societies

In his article Merges⁶⁴ pointed out that compulsory licences reduce transaction costs as the contract terms are predetermined which eliminates haggling or reduces it substantially. Furthermore, compulsory license schemes have ‘built-in’ administrative support saving the parties costs of record keeping, payment collection and royalty disbursement. He went on to say that a compulsory licence is an example of “collective valuation” via legislation. Collective valuation via legislation reflects the liability rule theory, which one may infringe first and a tribunal will determine the appropriate compensation in an ex-post proceeding.

In cost/benefit terms, the aim of compulsory licensing is to maximize the benefits resulting from increased access to works while minimizing the costs of access . . . Analysis of the economic effects of access and entry in to the market depends on four relevant interest groups: owners, secondary creative users, secondary productive users and consumers⁶⁵.

However, from an economic point of view, increased access leads to under-production of copyright works by allowing more competitive substitutes and thereby reducing owners’ rewards for any given work⁶⁶. Yet on the contrary, it increases access for secondary, creative users, with the threat of under-production being partially tackled by payment of fees. This

⁶⁴ Merges R. P., Contracting in to Liability rules: Intellectual Property Rights and Collective Rights Organisations (1996) 84 *California Law Review*, pp. 1293-1386.

⁶⁵ Gallagher T., Copyright compulsory licensing and incentives in Towse R., (ed.,) *Copyright in the Cultural Industries* (Cheltenham UK, Northampton Massachusetts: 2002), pp. 85-97 at p. 87.

⁶⁶ *Ibid.*, at p. 88.

was one of the reasons surrounding the dispute in the case of *Magill*⁶⁷. In this case, the appellants who were TV broadcasters (ITP, BBC and RTP), brought a case against Irish publisher, Magill TV Guide Ltd (hereinafter *Magill*) in an attempt to stop *Magill* from publishing weekly programme listings of those undertakings on grounds that it infringed copyright. The Court issued an interim injunction to restrain *Magill* from publishing the TV guides. *Magill* lodged a complaint with the European Commission, which held that the TV broadcasters were in breach of Article 86 of the EC Treaty. The TV broadcasters applied to the European Court of Justice (ECJ) for the annulment of the Commission's decision. However, the ECJ agreed with the Commission and held that the appellants, by refusing to provide information 'reserved to themselves the secondary market of weekly television guides by excluding all competition in that market ... since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide'. As such this case revealed that the compulsory license is one method of combating market power in situations where it appears that the owner is getting too much of a reward⁶⁸.

Yet, despite these benefits, Merges advocated CCS and counselled against compulsory licences, if transaction costs are to be kept to a minimum in intellectual property transactions. Merges justified his argument with the following reasoning. He highlighted that there can be 'expert tailoring' within CCS and not 'one-size-fits-all' terms as in compulsory licensing: i.e. CCS are able to produce an intermediate level of contract detail, which reflects the need for efficiency in carrying out a high volume of transactions. Merges further distinguished compulsory licensing from CCS by pointing out that the latter has proven to be more flexible over time. Merges argued that 'CCS outperform compulsory licences in lowering transaction costs.' Whilst CCS increases access to copyright works of rights holders in return for a licence fee, which minimises the costs of permitting access to their works, it also ensures that the needs of each client can be met separately. For example, Merges detects that industries, which are characterised by the need for high-volume intellectual property rights (IPR) transactions, actually serve a purpose: in that they will lead individual IPR holders to form CCS. These privately organised institutions then devolve standard rules of exchange that substantially lower transaction costs⁶⁹. This will achieve the

⁶⁷ Cases C-241&2/91P [1995] E.C.R. 1-743; *Radio Telefis Eireann v. Commission of the European Communities* (T69/89) (ECJ) European Court of Justice 6 April 1995.

⁶⁸ For a contrasting point of view, see, *IMS Health GmbH & Co., OHG v. NDC health GmbH & Co., KG* [2004] E.C.D.R. 23; [2004] 4 C.M.L.R. 28.

⁶⁹ *Op. cit.*, Merges R.P., n. 64. at p. 1311.

same result as state-created liability rules, such as compulsory licensing. However, the difference is that the individual right holders, rather than the state, set the standard terms of exchange within CCS, thereby creating an 'expert tailoring' system as opposed the 'one-size-fits-all' compulsory licensing system. Merges also stressed that 'although CCS cannot replicate the detailed negotiations of two individual parties, the rules they devise are more likely than the compulsory licence to approximate market bargains'⁷⁰.

In concluding the discussion on transaction costs and CCS, it can be seen that the benefits of collectives go beyond the idea that each copyright holder can earn more than acting as an individual, due to low transaction costs. Where a copyright holder attempts to exercise his or her copyright individually through a compulsory licensing system, the transaction costs could prove to be so high that trading the copyright is ultimately not even an option, therefore, leading to both under-production and under-utilisation. Under-production would result because the high transaction costs will in turn be reflected in the consumer goods leading a consumer to borrow rather than purchase at the price being charged by the monopolist right holder. A knock-on effect of under-production in the present context is under-utilisation arising from the inevitable 'free riders'. As the consumption of the goods amongst the free riders will be so high, a private profit-maximising firm will be unwilling to supply the goods, thereby leading to under-utilisation. In this sense, a better solution for the trading of copyright appears to be CCS. The words of Watt are appropriate to conclude this section.

The formation of collective societies to administer copyrights is an efficient means by which the transaction costs can be greatly reduced, since most of the creations in each collective have the same set of users. Hence, even if it is not profitable for individual copyright holders to negotiate their IP with the user set, doing so collectively with each member of the collective bearing only a fraction of the cost can make copyright transactions feasible. Also, monitoring use and bringing suit against copyright infringement may not be feasible individually, since the expected compensation that can be collected when a single copyright is infringed may not cover the monitoring and litigation costs. However if many copyrights are negotiated collectively, then the cost-benefit terms of monitoring use and of law suits can be drastically altered in favour of copyright holders⁷¹.

⁷⁰ *Ibid.*, at p. 1300.

⁷¹ *See, op. cit.*, Watt R., n. 14 pp. 163-165.

It has already been established that the core reason for the creation of collecting societies is its ability to reduce transaction costs. However, in addressing the monopolistic situation surrounding transaction costs, left to be considered and analysed is the situation where CCS compete against each other leading to competing collectives. In relation to competing collectives the question, which needs to be answered, is whether competing collectives is the answer to the issue of monopoly and ultimately to HEIs?

CCS – a competitive response

Any collecting society, by its nature and as a matter of fact, is in a dominant position, because it will represent the rights of a majority of a particular category of rights owners, both national and foreign in any given territory⁷². Stanley Besen, Sheila Kirby and Steven Salop⁷³, three US economists, investigated CCS and determined that the fact that a single agent manages an establishment on behalf of a large number of right holders which on the one hand reduces transaction costs, is one of the main causes for a monopolistic situation as opposed to multiple agents, each representing a single right holder to monitor the same establishment and thereby not having a monopoly in transactions. As such, Besen, Kirby and Salop looked in to the benefits of having ‘competing collectives’ in the field of intellectual property works.

They pointed out that one of the striking features of a monopoly collective, for example the CLA or Performing Rights Society in the UK, is that its membership is closed i.e. the collective limits its membership. The rights owners who make up the membership of collecting societies have the ability to influence the way in which their rights are administered and to control the operating methods of such societies, provided that certain guarantees to that effect are written in to the constitution of the collective in question. As such, all the individual rights holders represented by the society, or by bodies representing them, will take decisions concerning terms of membership, and the methods and rules of monitoring uses of works, collecting and distributing remuneration and enforcing rights. Members will also have access to regular, full and detailed information enabling them to judge whether the rules are being correctly applied, whether the costs of administration are reasonable and whether the distribution of remuneration is actually taking place as prescribed. Members will further expressly authorise any decisions to use fees collected by

⁷² Copinger & Skone James Copyright (London: Sweet & Maxwell; 1998) at 28-15.

⁷³ Besen S. M., Kirby S. N., & Salop S. C., An Economic Analysis of Copyright Collectives (1992) 78 *Virginia Law Review*, pp. 383-415.

their society to undertake additional activities for the defence and promotion of their member interests, such as, for example, anti-piracy campaigns or the promotion of cultural or social activities⁷⁴.

The fact that collective administration has to leave maximum freedom to right holders to manage their rights and face possible competition was established in a couple of decisions of the European Commission. In the *GEMA* decision⁷⁵ the European Commission ruled (among other points) that under the former Article 86 (since the coming into force of Treaty of Amsterdam 1996, Article 86 is now Article 82), members should be free to assign only particular categories of rights and to withdraw their administration if they so wish. In particular, individual right holders should be able to join foreign societies to manage their rights in countries where the national society merely acts through a reciprocal contract. In *Belgische Radio en Televisie v. SABAM*⁷⁶ the European Court of Justice questioned whether the Belgian copyright society was acting contrary to Article 86 by requiring assignment of all present and future copyrights as a condition of admitting a potential member to collective administration. The Court explicitly stated that any public authority does not entrust a copyright society by giving 'services of general economic interest'. A copyright society purely manages private, individual property interests. To retain rights for five years after a member withdrew was ruled as 'unfair' and possibly taking undue advantage of their monopoly position⁷⁷. The solution to this problem is to have open membership along with competition among collectives, which is discussed below.

A competing collective is characterised when a second closed collective (i.e. a collective with limited membership) enters the market, with higher administration costs but identical marginal costs⁷⁸ to the original closed collective. A relevant example here is the entry of US Broadcast Music Inc., (BMI) as a competing collective to the American Society of Composers, Authors and Publishers (ASCAP). At the time BMI came into existence, ASCAP did not have a legal monopoly. However, in 1939, ASCAP demanded a substantial increase in its licence fee, which resulted in some broadcasters boycotting ASCAP. As a result of the breakdown of negotiations between ASCAP and its licensees, BMI came in to

⁷⁴ *Op. cit.*, Copinger & Skone James n. 72 at 28-27.

⁷⁵ OJL 134, 20 June 1971; OJL 166/22, 24 July 1972.

⁷⁶ Case 127/73, *BRT v. SABAM*, 1974 ECR 313.

⁷⁷ *Ibid.*

⁷⁸ For definition and description as to what is meant by marginal cost, see, above p. 128.

being, as a competing collective to ASCAP. The point is however that the broadcasters would have created BMI even if ASCAP had met their demands and would have subsidised the entry of BMI to promote competition with ASCAP⁷⁹. As Shemel and Krasilovsky wrote in 1990, BMI 'was established by broadcasters in 1940 as a move towards increasing broadcasting industry bargaining power with ASCAP ...'⁸⁰. As such, according to the model formulated by Besen, Kirby and Salop, if a second closed collective (such as BMI) enters to compete with the original monopoly closed collective (for example, ASCAP), then each collective takes the membership of the other as given and makes its best response and their equilibrium behaviour will be simple to determine.

The maximum all-or-none licence fee (blanket licence fee) that each competing collective can demand equals the additional or incremental value of its members' works to the licensee. Each collective will attempt to maximise its surplus per member, assuming that it can charge a licence fee equal to the incremental value of its repertory. Equilibrium will arise when neither collective wishes to increase or decrease its own membership. This equilibrium has three main characteristics⁸¹ –

- (1) Each collective will receive a smaller licence fee than if it had the same membership but there was no competing collective. This is because each collective obtains only the incremental value of its repertory. As such, even if both collectives offer blanket licenses, the licensee will obtain a portion of the surplus.
- (2) Entry of a second collective will increase the combined membership of both collectives. The aggregate membership of both collectives would be larger than that which a single closed collective would choose.
- (3) The combined membership of the two collectives will not exceed, for example, the optimal number of literary works, songs, etc.

Additional collectives will thereafter enter only if the administrative costs are small. The reason for this is because the original closed monopoly will have lower administration costs and will use this as a 'weapon' against the competing collective by lowering its licence fee to a level that gives the licensees the same surplus that the competitor will offer. In other words, the original closed monopoly can ensure its monopolistic position by setting its

⁷⁹ *Op. cit.*, Besen, Kirby & Salop, n. 73 p. 402.

⁸⁰ *Ibid.*, as referred to in Besen, Kirby & Salop.

⁸¹ *Ibid.*, p. 403.

licence fee at a level at which the new entrant cannot operate profitably. This is known as 'limit pricing' to deter entry⁸². If the administration costs are small, competition among collectives may result.

Are competing collectives or a single collective the solution for HEIs?

It is clear that when licensees negotiate with CCS in groups rather than individually, for example, where HEIs negotiate with the Copyright Licensing Agency (CLA) as a group rather than on an individual institution basis, the results are more effective. As Besen, Kirby & Salop state; "such a scenario is not unrealistic, as group bargaining is a key aspect of the administration of copyrights"⁸³. However, the existence of two or more organisations in the same field may diminish the advantages of collective administration for both right holders and users. For the right holders, competing societies lead to duplication of functions and are unlikely to bring benefits to their members. For the user, a multiplicity of societies representing a single category of rights holders would also cause uncertainty, duplication of effort and extra expense. The user would have to check, for each work he or she wished to use, which society controlled it and whether he or she had the appropriate licence⁸⁴. It may also be that the two competing collectives will hold separate repertoires, both of which prove useful to HEIs. Will this mean a double expense for HEIs? To avoid copyright infringement, HEIs might find themselves having two blanket licences with the two competing collectives.

Therefore, although at first blush competing collectives may appear to be an attractive solution for HEIs, it is possible that the solution can throw up further problems. For example, 'collusion and vertical restraints' cannot be ruled out where there are two or more collecting societies in the same area. In other words, it is possible that the competing collectives may collude in an anti-competitive manner, or strengthen their position through vertical restraints – hence creating an even bigger monopoly. Vertical restraints take place when companies wish to expand whilst saving on money (by integrating their operations). As such, a vertical restraint or a 'business marriage' occurs when two or more parties combine to pool their activities in a particular field, often creating a new, jointly owned operative vehicle for this purpose, with its own management and access to sufficient

⁸² For more on 'limit pricing' see, *ibid.*, p. 400.

⁸³ *Op. Cit.*, Besen, Kirby & Salop, n. 73 p. 399.

⁸⁴ See also, *op. cit.*, Copinger & Skone James, n. 72 at 28-12.

resources. This, although a possible risk in relation to competing collectives, will be an unlikely problem in reality. On the other hand, collusion, as already pointed out above, is a more possible problem. A concerted practice will collude in an anti-competitive manner falling short of definite agreement, leading to what is known more colloquially as the 'nod and wink' method. Also, it is hard to prove concerted practices as they go to great lengths to cover their tracks. Moreover, it could be seen as an intelligent adaptation to market conditions and innocent parallel behaviour. The consequence for HEIs in this kind of scenario will be significantly higher licence fees in return for the access to the repertoires of both collectives. The only solution open to HEIs faced with this kind of situation is to look to Article 81, which exists to catch collusive conduct between or amongst undertakings, if the parallel conduct is suspiciously uniform.

As such, there appear to be reasons as to why competing collectives have not taken off in the UK. For example, Besen, Kirby and Salop have identified three reasons⁸⁵ for the lack of competition in UK and rest of Europe –

- (1) government regulation authorises only a single collective to administer a particular right, for example in countries like Austria, Germany and Switzerland where collectives must be licensed by the government;
- (2) government policies that mandate open entry and equal treatment of members may lead to a single collective; and
- (3) efficient negotiation between the monopoly collective and user groups may eliminate any incentive for competitive entry.

However, the idea of competing collectives has not gone unnoticed in the UK. The Monopolies and Mergers Commission carried out its investigation into the Performing Rights Society (PRS) in 1994-95, and the report pointed out the following drawback when considering competing collectives as a solution –

We noted ... that Canada has recently reverted from two competing organizations to one monopoly performing right society, and we became aware of only two jurisdictions, Brazil and the USA, where there were competing societies. Finally, we thought that, although it could be done, the creation of competing collecting societies in the UK was unlikely to bring benefits to the members. What some

⁸⁵ *Op. cit.*, Besen, Kirby & Salop n. 73 p. 398.

categories of member are likely to benefit from, however, is a single society, which has less rigid rules and policies, particularly concerning exclusivity ...⁸⁶.

Although there have been many changes since 1995, the idea of a competing collective has not yet been entertained.

What then would be an alternative solution to HEIs? The ASCAP consent decree and membership agreement in USA ensure that there are alternatives to the blanket licence in particular and to ASCAP licences altogether. ASCAP's right to license its repertoire is non-exclusive. As the ASCAP consent decree requires, every ASCAP member retains the right to license his or her works directly to any user, thereby breaking down the monopoly in setting licence fees. The decree also bars ASCAP from interfering with its members' right to issue licences. In fact, many members do issue licences directly to users. The new consent decree came into effect in September 2001, after the Department of Justice and the United States District Court for the Southern District of New York found it to be in the public interest⁸⁷. This is an interesting solution and opens the gates to a fairer system, which allows the HEIs to choose between an 'all-or-nothing' blanket licence system or a non-exclusive access to a collective's repertoire. Although the latter may not prove beneficial to large educational establishments, it may be the answer for smaller technical colleges and institutions. However, yet again, it begs the question whether an HEI will end up having to pay more by entering a blanket licence system and a non-exclusive system? It is submitted that probably the most viable solution would be to have some government interference by way of introducing government regulation of license fees. For example, many countries have established administrative bodies to oversee fees set by collectives, for example, the Federal Arbitral Commission in Switzerland, the Copyright Tribunal in the UK and German Patent Office. However, some of these bodies, such as the Copyright Tribunal in the UK, are reactive rather than being proactive. Therefore what is needed is a proactive system, similar

⁸⁶ Monopolies and Mergers Commission, *Collective Licensing – A report on certain practices in the Collective Licensing of Public Performances and Broadcasting Rights in Sound Recordings*, Cm 530 London, HMSO (1988), at paragraph 2.111; can also be found at http://www.competition-commission.org.uk/rep_pub/reports/1996/fulltext/378c2.pdf (last accessed 5 July 2006).

⁸⁷ *United States of America v. ASCAP* Civ. Action No. 41-1395 (WCC) Second Amended Final Judgement. See also, <http://www.ascap.com/reference/index.html> (last accessed 5 July 2006). Also note, on October 28, 2005, the ASCAP Board of Directors adopted clarifications to the Compendium of ASCAP Rules and Regulations.

to the US system, where the amended ASCAP consent decree requires that ASCAP set 'reasonable fees'.

In view of the above concerns, it can be seen that even competing collectives are not without their respective problems and defeat the purpose for which they were initially created: to reduce transaction costs. Therefore, although CCS may lead to monopolistic issues as a result of their legal nature, it does still benefit from the important characteristic of decreasing average costs as a result of the production being concentrated in one producer⁸⁸. However, the question in the digital era is whether the original concept of transaction costs, which was created in the analogue age, is still as efficient today? Does the existence of the Internet, reduce the importance of this concept and if so, how?

Old Wine in New Bottles: Copyright Collecting Societies in the Digital Era

Whilst reduced transaction costs played an important role in the analogue age for the creation of CCS, their importance can be questioned in the digital era. Also, the recent developments in the European Union (EU), although mainly in the music industry, have indicated the manner in which the concept of collecting societies can survive and be improved in the digital age. Furthermore, with the advent of e-learning and e-universities in the HEI sector, it is submitted that lessons can be learned from the multi-media industry.

The single most important decision in CISAC in recent years was the change in the CISAC Statutes to enable the organisation to adopt binding rules in connection with the [Common Information System] [*sic*] (CIS). This will enable us to bring the world of collecting societies in to the 21st century⁸⁹.

The International Confederation of Authors and Composers Societies (CISAC)⁹⁰ introduced the CIS Project in 2003 to respond to the challenges of digital technology and the Internet. However, the absence of a sufficiently simple licensing system for Internet transmissions meant that there was the danger of mass infringement of copyright and therefore the five

⁸⁸ See also, Rochelandet F., 'Are Copyright Collecting Societies Efficient Organisations? An Evaluation of Collective Administration of Copyright in Europe' in Gordon W. J., & Watt R., (eds.), *The Economics of Copyright: Developments in Research and Analysis* (Cheltenham UK, Northampton MA, USA: Edward Elgar Publishing; 2003), chapter 10.

⁸⁹ John Hutchinson, Chief Executive Officer of the MCPS-PRS Alliance at <http://www.mcps-prs-alliance.co.uk> (last accessed 5 July 2006).

⁹⁰ <http://www.cisac.org/index.php> (last accessed 5 July 2006).

societies with big repertoires – BMI (USA); BUMA (Netherlands); GEMA (Germany); PRS (UK) and SACEM (France) – created a new licensing model, called the Santiago Agreement 2000⁹¹. Referring to the agreement, on 3 May 2004 the European Commission announced that the structure put in place by the parties to the Santiago Agreement resulted in commercial users being able to apply for the licence from only the collecting society established in their own Member State. The Commission established that this could be in breach of competition rules, creating an unhealthy monopolistic situation. Therefore, another Agreement, known as the Simulcasting Agreement, was notified to the Commission on 8 October 2002⁹². This Agreement portrayed how a multi-territorial, multi-repertoire simulcasting (i.e. broadcasting) licence covering the repertoires of a number of collecting societies enabling a simulcaster/broadcaster to obtain a single licence from a single collecting society for its simulcast can be accessed globally. As such, this agreement was hailed as a breakthrough for collecting societies, which were facing technological challenges with the advent of the Internet. This licence concerns issues particular to the music industry and therefore is not of direct relevance to the present discussion. However, keeping in line with the issues of monopoly and reduced transaction costs discussed in this chapter, the following points are relevant.

The Simulcasting Agreement illustrated that transaction costs can be lower in the digital era and break down the monopolistic nature as one licence obtained from any of the relevant collecting societies within an European Economic Area (EEA) covers the repertoires of all the other collecting societies in that area or a society party to the agreement. This is an enormous improvement from traditional collecting societies in the analogue era where a single licence obtained in one country would cover the works of that country or the works in other countries with which the former country had signed bilateral agreements. In contrast, the new system in the digital era provides a user with a centralised service that avoids the lengthy, cumbersome and the unfeasible task of seeking copyright clearance from all individual rights holders belonging to a number of countries.

⁹¹ The Santiago Agreement was introduced to rectify the shortcomings of what was known as the VERDI Project and also a previous agreement, known as the Sydney Addendum. The main objective of the VERDI (Very Extensive Rights Data Information) Project was to respond to the challenges of the digital technology in protecting copyright and related rights. This project was created to facilitate multimedia rights trading by creating European-wide rights information and licensing network between national copyright collecting clearance services.

⁹² Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case No COMP/C2/38.014 – IFPI Simulcasting, 2003/300/EC; L 107/58

Addressing the issue of the freedom of choice for the user, such as HEIs, the Simulcasting Agreement ensures that the user has a freedom of choice and can benefit both in the short-term and long-term. In the short-term the user will get easier and wider access to a range of [music] by means of the available simulcasts, which is accessible from virtually anywhere in the world⁹³. In the long-term as the effort of [music] producers is duly rewarded, a wide range will still be available in the future⁹⁴.

The next part of the paper will set out the EU's response to the regulation of collecting societies and the protection of creative works of its members, the right holders, in the digital era. A further reason for considering the EU's response is to determine whether a single monopolistic collecting society is the way forward and how competition can be introduced to provide for a more effective system.

European Parliament and European Commission responses to the regulation of collective management in the digital era

The EU has taken steps to address the issue of monopoly within copyright collecting societies and has recognised that the solution to this issue lies in the lack of competition and transparency for both right holders and users. The fact that the EU is looking to improve the existing system illustrates that the concept of copyright collecting societies is still considered to be very much alive and cannot be disregarded in the digital era. Once again the developments involve issues in the music industry, and therefore only the relevant points to the present discussion will be highlighted.

On 15 January 2004 the European Parliament published an own-initiative report about the importance and future of copyright collecting societies⁹⁵. In this report, the European Parliament also took into account the monopolistic nature of collecting societies and insisted on using competition law to examine possible abuse of monopoly, forcing the societies to be 'transparent' about their management fees, keeping the administrative costs at a maximum of 10-15% and creating arbitration procedures that are affordable for everybody⁹⁶.

⁹³ *Ibid.*, at para. 94.

⁹⁴ *Ibid.*, at para 95.

⁹⁵ European Parliament Report on a Community framework for collecting societies for authors' rights (2002/2274 (INI)), Final A5-0478/2003, 11 December 2003. For further commentary, *see also*, EP in favour of collecting societies and levies at <http://www2.europarl.eu.int/> (last accessed 5 July 2006).

⁹⁶ The Danish collecting society for the administration of composers, songwriters and music publishers, KODA, reflects administration costs of 12% This is illustrative of the fact that administration costs can be kept to a minimum. See KODA at <http://www.koda.dk> (last accessed 5

The European Parliament's report pointed out the following reasons for advocating a Community framework for collecting societies –

- To respect and comply with the principles of copyright and competition law;
- Although *de facto* and *de jure* monopolies do not pose a problem for competition, they still carry out tasks in the public interest and in the interest of right holders and users and therefore require a degree of regulation;
- The importance of competition law for examining possible abuses of monopoly by collecting societies in individual cases so as to be able successfully to ensure the rights management in the future; ...
- To ensure transparency, democracy and the participation of creators; stresses that the institution of levies as compensation for free reproduction for personal use constitutes the only means of ensuring the equitable remuneration for creators and easy access by users to IP which cannot be replaced by DRMS;
- To ensure that the financial value of creators rights which they contribute to the collective management society represents the freedom of creators to decide for themselves which rights they wish to confer on collective management societies;
- Whatever form they may take in each EU state, the importance is for them to fulfil their functions as trustees;
- Calls for the establishment of minimum standards for organisational structures, transparency, accounting and legal remedies;
- Calls for an end to conflict of interests (when the right holder and user are the same person) in operation of collecting societies;
- Operation of one-stop-shop could be in jeopardy for a number of reasons.

Following on from the European Parliament's report, the European Commission adopted a communication on copyright and collecting societies on 16 April 2004 titled *The Management of Copyright and Related Rights in the Internal Market*⁹⁷. In the communication, amongst other issues the Commission addressed the issue of Collective Rights Management and Competition⁹⁸. It stated that as regards the application of EU competition law to collecting societies, intervention by the Court of Justice and the

July 2006). In UK, the Copyright Licensing Agency has a similar administration fee ('subvention income') of 11-12%.

⁹⁷ Communication from the Commission to the Council, the European Parliament and the European Economic and Social - Committee *The Management of Copyright and Related Rights in the Internal Market* (COM (2004) 261 final), 16 April 2004.

⁹⁸ *Ibid.*, at p. 16.

Commission traditionally addressed three broad issues: (1) the relationship between collecting societies and their members; (2) the relationship between collecting societies and users and, lastly, (3) the reciprocal relationship between different collecting societies.

In relation to the first issue, it was identified that a possible abuse of a dominant position under Article 82(a) of the EC Treaty can arise where a collecting society makes it a mandatory requirement in its statute that all rights of an author be assigned, including their on-line exploitation, particularly if it leads to an imposition of an unfair trading condition⁹⁹. This is an area which the Commission will deal with in tackling the issue of monopoly generated by collecting societies. As far as membership of a collecting society is concerned, the Commission has also stated that a collecting society in a dominant position is not allowed to exclude right holders from other Member States¹⁰⁰. In relation to the second issue, the Commission identified three further issues which arose: (a) effects on trade between Member States; (b) material scope of the licences granted to users and (c) the level of tariffs charged to licensees. Under these three categories, the Commission made it clear that collecting societies may not engage in a concerted action having the effect of systematically refusing to grant direct access to their repertoires by users located in foreign territories¹⁰¹.

In relation to the tariffs, the Court of Justice has observed that one of the most marked differences between collecting societies of different member states lies in the level of operating expenses. The Court admits that it is the lack of competition in the market that accounts for high administrative costs and the high level of royalties. The Court also pointed out that Article 82 of the Treaty must be interpreted on the basis that a collecting society in a given Member State 'abuses' its dominant position if it imposes unfair conditions on its trading partners by, namely, imposing appreciably higher tariffs than those applicable in other Member States unless the differences were justified by objective and relevant factors. It is the aim of the European Commission to rectify these drawbacks in considering the future of collecting societies in general.

⁹⁹ *Banghalter et Homem Christo v. Sacem* (the "Daftpunk" decision), case COMP/C2/37.219, decision of 06.08.2002 available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37219/fr.pdf> (last accessed 5 July 2006).

¹⁰⁰ *GEMA I*, Decision of 20.06.1971, OJ L134/15; *GVL*, Decision of 29.10.1981, OJ L370/49.

¹⁰¹ *Ministere public v. Tournier*, case 395/87, 13 July 1989, ECR (1989) p. 2521.

On 19 April 2004 the Commission launched consultations with a view to regulating collecting societies', which managed the marketing of copyrighted products such as music, literary works, artistic works etc. In its framework of the specific preparation for this initiative, the Commission launched an additional consultation of interested circles, which followed on from the consultations carried out up until 2002. The supplementary consultation allowed further discussion on the impact of this initiative on collective rights management and the good governance of collecting societies, which closed on 21 June 2004.

Based on the needs and results of the consultation, the Commission arrived at four main conclusions¹⁰² –

- An Internal Market for collective rights management will be more firmly established if a legislative framework on the governance of collecting societies is implemented at Community level. Such a framework can then address issues surrounding the establishment and status of collecting societies, the relationship they have with right holders and commercial users, and lastly, their external supervision. This would ensure that the collecting societies are transparent. It would foster Community-wide licensing for the exploitation of rights.
- There is no need for the moment to take any action at Community level with regard to individual rights management.
- The advent of DRM systems has generated high expectations but a necessary pre-condition for their development is their interoperability and acceptance by all stakeholders, including consumers.
- With regard to increasing demand for Community-wide licensing for the exploitation of certain rights, Commission's communication describes several options for improving the situation. In principle, the response to this demand should be market-led, but it could be supported by common rules on collective rights management and on good governance of collecting societies.

Thereafter, on 7 July 2005, the European Commission published a Working Document, entitled 'Study on a Community Initiative in the Cross-Border Collective Management of Copyright'¹⁰³. This Study provided three solutions of which the two relevant solutions are –

¹⁰² *Ibid.* See also, Copyright: the Commission advocates European legislation on the governance of collecting societies at <http://europa.eu.int/rapid/> Reference: IP/04/492 (19/04/2004) (last accessed 6 July 2006).

¹⁰³ http://europa.eu.int/comm/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf (last accessed 6 July 2006).

- (1) Ways in which cross-border cooperation between national collecting societies in the 25 Member States can be improved; and
- (2) Giving right-holders the choice to authorise a collecting society of their choice to manage their works across the entire EU.

Solution (1) provides a certain degree of transparency to right holders and users alike. By virtue of the non-discrimination principle being applied to the distribution of royalties, right holders can now look towards a better system and as such better information on how their works are monitored abroad and on how the royalties collected on their behalf are transferred to the management society in their home territory. Solution (2) appears to provide an even better level of transparency for right-holders because the collective rights management society of their choice is accountable for all use of works across the Community and for the redistribution of royalties in exact proportion to this use. If the right holder is not satisfied with the functioning of the relationship, he has the choice to seek Community-wide clearance services elsewhere, a strong incentive to carry out optimal and transparent clearance and royalty services. Elaborating on the point of competition, solution (1) should in theory be able to compete to attract the business of commercial users. Solution (2) would create the situation where the CCS would have to compete amongst them to attract right holders. Therefore, as far as competition is concerned, solution (2) can be referred to as the 'right holders option' whilst solution (1) is more favourable to commercial users.

Most recently, on 12 October 2005, the European Commission made a Recommendation on the management of online rights, once again, in musical works¹⁰⁴. The latest recommendation proposes the elimination of territorial restrictions and customer allocation provisions in existing licensing contracts while leaving right holders who do not wish to make use of those contracts the possibility to tender their repertoire for EU-wide direct licensing¹⁰⁵.

¹⁰⁴ Commission recommendation on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (21.10.2005) at http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm See also, EUROPA – Rapid – Press Release: Music Copyright: Commission recommendations on management of online rights in musical works at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1261> (last accessed 6 July 2006).

¹⁰⁵ *Ibid.*

Analysis and conclusion: Significance of the EU developments for HEIs

Integration of knowledge is becoming more and more apparent with the emergence of e-distance learning and e-universities. In the year 2000, Pricewaterhouse Coopers (PWC) drew up a business model at the request of the British & Irish Legal Education Technology Association (BILETA) for the creation of e-universities in the UK. In this business model, it was accepted that –

The creation of a new university, whatever the size of the foundation, is always an ambitious project. To base it on electronic pedagogy is highly innovative, and is clearly a major initiative in the field of technology and higher education. We consider that the proposal will in the long term probably have more effect on the UK higher education community than did the TLTP [*Teaching and Learning Technology Programme*] initiatives. For this reason we support the idea of the e-university in principle. However, we have a number of concerns regarding the implementation of the concept within the business model¹⁰⁶.

Whilst some of the concerns surrounded the quality of teaching, research and award of degrees within these e-universities, it is submitted that a further concern would relate to issues in licensing and cross licensing. For example, University X (a physically located university) in the UK opens branches of its institution in China and Taiwan. Due to the vast difference in copyright laws, in China, Taiwan and the UK it can be questioned whether the copyright laws of the UK bind the students of China and Taiwan. In this situation it seems sensible that the students in China and Taiwan who wish to attend the international HEI will have to abide by the regulations of that institution and hence the copyright laws of the UK. On the other hand, if an e-university follows the same process, without a physical institution being in existence, it also seems logical that issues of copyright and therefore a need for cross-licences will inevitably become a necessity. As such, it is proposed that a consideration of the solutions in the music industry will offer guidelines, which can be followed in the literary and HEI sectors.

In the present context, the benefits for the literary field and HEIs can be drawn, firstly, from the Simulcasting Agreement. The Simulcasting Agreement portrayed the manner in which rights holders and users can both benefit by doing away with the cumbersome task of

¹⁰⁶ <http://www.bileta.ac.uk/pages/Publications.aspx> (last accessed 6 July 2006).

seeking copyright clearance from all individual rights holders belonging to a number of countries. In the case of HEIs, which partake in e-learning, for example, this system could prove cheaper for HEIs around Europe, which will now have the prospect of shopping around before becoming members of a single copyright collecting society. For example, the single HEI licence will cover the repertoires of a number of CCS within an EEA and will provide access to larger repertoires and most importantly give users the possibility and luxury of 'choosing' a CCS from within an EEA. Although this is a hypothetical solution for HEIs, drawn from developments in the music industry, its importance can become more pronounced in the future as e-learning and e-universities become more integrated within society.

It is appreciated that access to different repertoires across EU could give way to 'abuse' of monopoly once again, as a result of the power which rights holders have to give permission to various institutions including HEIs to access their copyright works. In response it can be pointed out that a multi-territorial, multi-repertoire licence, which can be obtained from a single CCS, will create competition amongst collectives and hence break down the barriers of monopoly. Therefore, if the European Commission recommends that for the betterment of education, each EU member state create a single HEI licence, similar to a single simulcasting licence, it will create a very strong single point and single access point for educational material *per se*.

Creating a system which allows the right holder to choose a Community-wide collective management society will undoubtedly lead the CCS to be more efficient in relation to their management services. This also means that CCS would achieve rules of good governance and external control¹⁰⁷. Although this is still a long way away for HEIs, it illustrates the opportunities which the digital era offers to right holders and users, when technology is embraced when entering the music industry or entering some form of education through distance learning or e-learning. In creating a more harmonised system for collective management societies, which reflect good governance, the following criteria as identified by the European Commission must be observed. These include (a) the establishment and status of collecting societies; (b) the relation of collecting societies to users; (c) the relation of collecting societies to right holders; and (d) the external control of collecting societies. The

¹⁰⁷ This was a recommendation made by the Communication from the Commission to the Council, the European Parliament and the European Economic and Social - Committee The Management of Copyright and Related Rights in the Internal Market (COM (2004) 261 final), 16 April 2004.

question is how effectively will a structure for cross-border collective management of legitimate interests work, taking into account that each member state has very different systems in place and an attempt at harmonisation of all of the above four aspects could be an uphill struggle.

The users' main concern in relation to collective management usually is on the tariffs they have to pay and the licensing condition they have to adhere to. The Commission stressed that societies should be obliged to publish their tariffs and grant a license on reasonable conditions and users should be in a position to contest the tariffs, whether through courts, mediation tribunals or public authorities. As such it is submitted that these developments tailored for CCS in the music industry are equally applicable to the literary society and HEIs where transparency, rules of good governance, external control and harmonised system within CCS could prove to be the old wine in new bottles.

**SHOW ME THE MONEY:
A CASE STUDY INTO THE COPYRIGHT
LICENSING AGENCY**

CHAPTER 6

SHOW ME THE MONEY: A CASE STUDY INTO THE COPYRIGHT LICENSING AGENCY

Introduction

This chapter will look at the Copyright Licensing Agency (CLA) in order to demonstrate how a Copyright Collecting Society (CCS) operates in practice. As such, this chapter provides a practical overview of the concepts raised and discussed in Chapter 5. This chapter will bring the two strands, of HEIs and CCS, together in order to evaluate how efficiently they work together and question whether HEIs benefit from interaction with the CLA. One of the main aims of carrying out an examination into the CLA is to seek an answer to the question of whether the blanket licensing system between HEIs and the CLA functions smoothly for the benefit of the parties. Furthermore, it is important to respond to the question - are authors, particularly, academic authors, fairly remunerated through CCS? By taking an in-depth look at the CLA and the manner in which licence fees are collected and distributed, this chapter highlights some of the drawbacks in the distribution of licence income thereby querying into one of the core functions of CLA.

Before presenting the findings of the study into the collection and distribution of licence fees, the survey system and the most recent blanket licence between CLA and HEIs, **Part One** will set out how the interaction between CLA and HEIs came about. The focus will be on the Higher Education Copying Accord (HECA). Thereafter, the chapter will provide an insight into the important case of *UUK v. CLA* which arose as a result of a breakdown in negotiation of the HECA licence. One of the main objectives of considering this case is to highlight the monopoly aspect of copyright administration, in particular the transaction costs that are attached to the trading of copyrights. Following on from this, the discussion also questions whether the transaction fee/licence fee which CLA claimed from HEIs, which became the focus of *UUK v. CLA* was reasonable?

Taking a close look at the CLA, **Part Two** of the paper considers the collection and distribution of licence fees, the survey methodology and how the survey methodology assists

in the distribution of accurate remuneration. The distribution process within a collecting society is a very elaborate and complex process and is not fully appreciated by the public users. For this reason therefore, in writing this chapter, a study was carried out within the CLA to gain a detailed knowledge of the manner in which the system operates and to ascertain whether the criticisms, which have been launched against the CLA, are justified? Part Two will begin by taking a general look into the CLA's Annual Reviews of 1999, 2003 and 2004. The Annual Reviews are documents which are available to the public and this section aims to set out the information as it would be perceived by a user of copyright material from the general public who is interested in finding out about the CLA. The reason for carrying out this detailed study into the Annual reviews of the CLA is to establish *whether* and *how* academic authors are fairly remunerated. In dealing with the issue of fair remuneration Part Two will seek a deeper insight into, and set out detailed findings about the distribution process at the CLA.

Visiting the CLA offices in Edinburgh and London assisted in the collection of the information set out in this chapter. Certain gaps detected in the Annual Reviews by the writer, particularly in relation to the distribution of licence income, were raised and addressed during the meetings at CLA offices. Thereafter, the chapter will outline the survey methodology of the CLA in relation to photocopying and scanning/digitisation; the manner in which it is done; and the reasons for carrying out these surveys. **Part Three** will carry out a critical analysis of the most recent HECA licence to illustrate the clauses within a HECA licence and their effect on HEIs.

In bringing this chapter to a conclusion, the writer has carried out an analysis of the statistical data, reviews written by academics and the press and in weighing the pros and cons of such information has set out an informed opinion on the advantages and disadvantages of the CLA as a copyright collecting society.

PART ONE:

Interaction between Higher Education Institutions and the Copyright Licensing Agency

The Report of the Committee to consider the Law on Copyright and Designs¹ (the Whitford Committee) was instrumental in the creation of the 1988 Act, which recommended the setting up of a collecting society to promulgate blanket licensing schemes² in respect of the reprographic reproduction. This means that instead of individual authors or publishers being responsible for collecting their own royalties, remuneration is collected at a standard rate by a central collecting agency or society which undertakes the task of distribution of the revenue to the individual copyright owners whose works are reproduced³.

In order to enforce the blanket licensing scheme and enable it to operate successfully the Committee made proposals along the following lines⁴ –

- Reprographic reproduction should still be a restricted act.
- However, within particular areas to be designated by regulation a period should be allowed in which copyright owners, through recognised collecting societies, can promulgate blanket licensing schemes. If they fail to do so within that period then, until such schemes are promulgated, reprographic reproduction within that area should not be an infringement.
- The areas referred to under the above point, would include copying by libraries, educational establishments, Government departments, industry and professional interests and indeed by copying agencies. No copying should be allowed which would conflict with the copyright owner's normal modes of exploitation, e.g. the distribution of copies to the public.
- The number of societies must be kept as low as possible to avoid the need for users to have to take out a multitude of licences and to keep administrative costs to a minimum. In the literary field there should at most be one society for books and

¹ The Report of the Committee to consider the Law on Copyright and Designs, (Chairman: The Honourable Mr. Justice Whitford), March 1977, Cmnd 6732.

² *Ibid.*, at pp. 70-74; 168-172.

³ *Ibid.*, at p. 70.

⁴ *Ibid.*

one for periodicals. As such, Ministerial recognition of those societies allowed to operate is essential.

- All negotiations between collecting societies and users should be subject, in the event of dispute, to appeal to a copyright tribunal.

Section 116 of the 1988 Act reflects the adoption of a licensing body and licensing schemes, whilst section 118 establishes a Copyright Tribunal as recommended by the Whitford Committee. Previously, the Copyright Tribunal was known as the Performing Rights Tribunal and as its name suggested dealt mainly with disputes arising from performing rights. However, the Whitford Committee noted the importance of having a Copyright Tribunal to cover not only music disputes, but also disputes thrown up in the reproduction of literary and artistic works. The importance of this grew at the same time as the expansion of the higher education sector and the emergence of the photocopy machine, as explained in Chapter 2.

Before moving on to consider the interaction between HEIs and collecting societies, an introduction to the setting up of the body representing HEIs and the relevant collecting society (CLA), which was created on the recommendation of the Whitford Committee, will be briefly summarised.

CVCP to UUK: the body representing HEIs in UK

The Committee of Vice-Chancellors and Principals of the Universities of the UK (hereinafter CVCP) originated in the 19th century when there were informal meetings involving Vice-Chancellors of a number of Universities and Principals of University Colleges. The first official consultative meeting of CVCP took place in 1918 to manage a mere 22 universities⁵. As the number of universities grew, so did the CVCP and during the 1980s a review of the role and structure of CVCP was carried out and completed in 1988. Further changes took place in 1992⁶ and in 1995⁷. A further change came about at the start of the 21st century, when on 1 December 2000, CVCP's name, logo and identity were changed in order to reflect

⁵ Brief history of Universities UK at <http://www.universitiesuk.ac.uk/history> (last accessed 10 August 2006).

⁶ In 1992, Government legislation enabled polytechnics to become universities. The committee's membership through this change increased to over 100 institutions.

⁷ From 1995 onwards, as a direct result of the Devolution in Scotland and Wales and in order to ensure the continued provision of valued services to all the members, the National Council structure was created.

changes which had taken place in the organisation. CVCP became Universities UK (hereinafter UUK).

The Copyright Licensing Agency (CLA)

The Copyright Licensing Agency (CLA) is a non-profit making agency (i.e. it is a company limited by guarantee and not having a share capital) that licences organisations for photocopying and scanning. Its legal constitution is governed by section 263 of the Companies Act 1985 (hereinafter 1985 Act). Section 263 of the Act establishes the general rule that distributions may only be made out of profits available for the purpose. For the purposes of Part VIII of the 1985 Act the term “distribution” is defined widely to cover every description of distribution of a company’s assets to its members, except those specified in section 263(2). It would include, for example, dividend distributions, profit distributions as in the case with CLA or a distribution by way of a repurchase of shares (unless the repurchase was made out of unrealised profits or out of capital, for which there are rules elsewhere in the Act). Profits available for the purpose of distributions are defined in section 263(3) as net, accumulated, realised profits. This means that any accumulated, realised losses must be deducted when calculating distributable profits.

After the recommendation of the Whitford Committee CLA was set up in 1982 and since its inception it has been acting on behalf of authors, artists and publishers of books, journals, magazines, law reports and periodicals by issuing licences and ensuring copyright compliance. The agency says it strikes the balance between creativity and incentive as it allows organisations and institutions to fulfil their information requirements whilst at the same time protecting copyright and hence encouraging creativity. In order to carry out this objective, CLA

(c) Obtains from the Copyright Owners such assignments, assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient for enabling the Agency to exercise and enforce in its own name or otherwise all such rights and remedies . . . and to execute and do all such assurances, agreements and other instruments and acts as may be deemed necessary or expedient for the purpose of the exercise or enforcement by the Agency of such rights and remedies...;

(d) To distribute the net monies received by the Agency in the exercise of the foregoing powers, after making provision thereout for the expenses and liabilities of the Agency incurred in such exercise or in otherwise carrying out the purposes and

operations of the Agency and for any contributions or payments for any of the purposes specified in the next-following sub-clause hereof ...⁸.

In accordance with the provisions of CLA's Memorandum of Association, a "copyright owner" will include –

- (1) any author of literary, dramatic or artistic works;
- (2) any composer of musical works;
- (3) any publisher of any such musical, literary, dramatic or artistic works; and
- (4) Any other person who is entitled to an interest in such works⁹.

The copyright owners (i.e. authors and publishers), which CLA represents, own the agency¹⁰. In accordance with (d) above, the money that is collected from organisations such as HEIs are then distributed to the copyright owners through the Authors' Licensing and Copyright Society (ALCS) and the Publishers' Licensing Society (PLS) which together set up CLA in 1982.

The Copyright Tribunal

Section 118 of the 1988 Act states that 'the terms of a licensing scheme proposed to be operated by a licensing body may be referred to the Copyright Tribunal by an organisation claiming to be representative of persons claiming that they require licences in cases of a description to which the scheme would apply, either generally or in relation to any description of case'. The Tribunal will make a decision as to whether to entertain this reference and if the Tribunal decides to do so, then it shall consider the matter referred and make such order, either confirming or varying the proposed scheme so far as it relates to cases of the description to which the reference relates. The effect of section 118 is also to signify that a licensee as opposed to the licensor, CLA, may take a case before the Copyright Tribunal. Having such a system in place paves the way for a substantive basis for testing licensing schemes. For example, the system exists at least in part to prevent unreasonable terms being imposed on licensees who have little choice but to take a licence or be held liable for in the infringement of copyright law. As such, where a licensee organisation is of the opinion that the terms of the blanket licence require change and an attempt at change has

⁸ Memorandum of Association, Copyright Licensing Agency Limited. Company No 1690029, incorporated on the 7th January 1983.

⁹ *Ibid.*, clause 3(a)(i)-(iv).

¹⁰ These include ALCS; PLS and CLA also has an agency agreement with the Design and Artists Copyright Society (DACS).

not been possible through negotiations with the licensee organisation such as HEIs and licensor, CLA, then the matter can be taken before the Copyright Tribunal.

How the Interaction between HEIs and CLA Came About: An Introduction

Following the recommendations of the Whitford Committee, and the setting up of CLA, negotiations opened between CLA and CVCP (as it was called then) in June 1986 to establish an experimental licensing scheme covering the photocopying of copyright materials within British HEIs. This was known as the Higher Education Copying Accord (HECA). The outcome was a trial by 22 HEIs for one year commencing on 1 January 1988. This was the very first Trial Scheme between HEIs and CLA. By June 1989, CLA and HEIs had negotiated and entered into agreement and on 4 July 1989, CVCP wrote to all its members to advise that each HEI would then deal directly with CLA, signing their Agreement. The Agreement was due to come into operation on 1 January 1990 and the fee at that time was set at £1.475 per Full-Time Equivalent Student (FTES)¹¹. By the third year of the licence being in operation, the fee had increased to £1.68 per FTES. The licence was supplemented in 1993 and the supplemented version came in to operation on 1 May 1993 for a period of 2 years and 3 months. A fundamental change in the 1993 version of the licence introduced the separate treatment of course packs. The 1993 licence expired in 1995 with a fee reflecting £2.25 per FTES, and was renewed once again until 31 March 1998. The terms remained unchanged, although the licence fee kept changing, increasing to £2.52 by 1997/98¹².

In April 1998, CVCP and CLA signed a licensing agreement once again. The fundamental change in the 1998 licence was the inclusion of a clause permitting scanning and storage of printed material, which had not been available before. As in previous years, for use and access to materials under the licence, all universities had to pay the CLA a flat charge (a blanket licence fee) and it was agreed that it would be £3.25 per FTES¹³. The 1998 licence was due to expire in 2001.

¹¹ FTES includes all full-time and part-time undergraduates and taught postgraduates, excluding research postgraduates who are supervised but not taught.

¹² The development of the HECA licence from mid 1980's is clearly outlined in *UUK v. CLA* [2002] R.P.C. (36) 693, paras: 111-135 at pp. 717-720. Case Nos: CT 71/00, 72/00, 73/00, 74/00, 75/01 in Copyright Tribunal, April 2002.

¹³ CLA initially believed the fee should be £6.72 but realising that it was unrealistic proposed a fee of £4.20.

The 1998 HECA licence covered three types of photocopying (and other forms of mechanical reproduction) within universities:

- ‘Normal’ photocopying by university staff and students, chiefly in libraries and academic departments;
- University teachers’ use of copyrighted material for the provision of student study (course) packs;
- The supply of materials to library reserve (short-loan) collections¹⁴.

This licence was at the heart of the controversy resulting in the *UUK v. CLA* case, considered below. After the HECA licence was put in place, in November 1999, the National Centre for Legal Education (now the Centre for Legal Education) asked legal academics across the UK for feedback about the HECA licence, particularly, in relation to the effects of HECA on classroom teaching and student access to teaching materials. The responses were unanimously negative¹⁵. This led to the licence being opened up for negotiations between UUK and CLA once again. As the matter could not be settled through negotiations it was taken before the Copyright Tribunal in 2001.

Following the Copyright Tribunal’s decision, the HECA licence of 2001 did away with the two-tier course pack scheme and incorporated the two-tier system into a single licence. Further, the new blanket licence fee as decided by the Copyright Tribunal was set at £4 per FTES.

The next development in relation to HECA came about in 2003, when UUK and CLA signed the CLA Higher Education Digitisation Licence – a licence that would permit the creation of master digital copies (and subsequently utilise the same) with the consent of the copyright holder. However, this licence has been criticised by HEIs for being too restrictive, with HEIs having to pay on a price-per-page basis, making this system cumbersome and expensive. The most recent development came about in August 2005 amalgamating the photocopying and scanning licences into a single licence, which is certainly a step forward in the right direction. In a Press Release issued by the CLA, it was stated –

¹⁴ See also, <http://www.ukcle.ac.uk/copyright/understanding.html> (last accessed 10 August 2006).

¹⁵ See, *ibid*.

The trial licence represents a significant step in the collective licensing of rights within HE: for the first time institutions can scan under a licence on terms similar to those that currently apply to making photocopies. The new scanning rights will help HE institutions to meet the demand for electronic based learning and teaching material¹⁶.

In response, Diana Warwick, Universities UK Chief Executive said –

I am pleased that co-operation between CLA and UUK/SCOP has enabled this valuable addition to the existing licence to be agreed¹⁷.

The effect of this change is that there is no longer the need to make separate arrangements for digital copying. CLA also gives the option to HEIs to subscribe in September 2005, which will backdate their licence to 01 August 2005, or if HEIs miss this deadline, they can opt in from February 2006. The latest HECA licence can be praised for doing away with separate licences and making the system easier with a single licence. As digital copying was previously dealt with separately, it meant that the Digitisation Licence did not employ a blanket licence method as with the photocopying scheme. Instead, the licence fee was paid according to how many digital copies were used during an academic year, which involved a lot of administrative work and accurate recording of the making of Digital Copies by a Licensing Coordinator. The new licence, by merging the photocopying and digital licences, makes matters much easier as both photocopying and scanning now operate under the blanket licensing scheme. This new licence however places obligations on HEIs: for example, there are new requirements for data reporting and auditing of scanning within institutions, which will allow UUK/SCOP and CLA to determine the overall impact of this licence. A discussion on the terms of the new licence is set out below.

Having summarized the development of the HECA licences from their inception to 2005, it is now timely to consider the licence of 1998, which led to the controversial *UUK v. CLA* case.

¹⁶ CLA Press Release, *Scanning Rights for Higher Education* (16 August 2005) at http://www.cla.co.uk/news/press_releases/press111.html (last accessed 10 August 2006).

¹⁷ *Ibid.*

The case against CLA: *UUK v. CLA*

The case of *Universities UK (UUK) v. Copyright Licensing Agency Limited*¹⁸ highlighted some of the major issues that were being faced by educational establishments in relation to copyright licensing. The Copyright Tribunal was asked to determine several elements of the blanket licence, namely, the amount of money payable by universities' whether there should be a two-tier system which catered for a Course Pack¹⁹ scheme; and if so whether this scheme required a further fee to be paid for the reproduction of copyright material.

Course Pack in this case was defined as “a compilation (whether bound or loose-leaf) of four or more photocopied extracts of Licensed Material from one or more sources which compilation: (a) exceeds twenty five pages of such Licensed Material; and (b) is intended to provide the students registered on a Course of Study with a compilation of materials designed to support the teaching of that Course of Study; and (c) is prepared and distributed in advance of and/or during a Course of Study and either piecemeal or in one batch”²⁰.

The case elaborates on Course Packs and the extensive arguments run to a large number of pages. UUK contended that the two-tier licensing system administered by Copyright Licensing Agency Rapid Clearance Service (hereinafter CLARCS) was ‘uncertain, restrictive and cumbersome’ and therefore should be abolished. A specialised team within CLA administers CLARCS and requests for clearance are usually received from library staff or a dedicated copyright officer at HEIs, although in a minority of cases requests are received from the academic department within the HEI requiring the Course Pack. The requirement that Course Packs be separately cleared through the CLARCS system can be seen as having two component parts. The first part is a restriction on the general, so-called ‘blanket’ part of the Licence forbidding copying if the nature of the copying is such as to fall within the Course Pack definition. The second part is an agreement on the part of the HEI, where there is an intention to create a Course Pack, to seek permission through CLARCS. This may or may not be obtained depending on whether the rights owner has given the CLA a mandate for CLARCS. The rates charged for CLARCS clearance have varied over the years. Under the 1993 Agreement it was typically 6p, 9p or 13p per page. Under the 1998

¹⁸ Case Nos: CT 71/00, 72/00, 73/00, 74/00, 75/01, in the Copyright Tribunal, [2002] R.P.C. (36), 693. For an analysis of the case, see, The IP Forum, Copyright – *Whose Flexible Friend in the Information Society*, Intellectual Property Institute, 23 November 2001, pp. 32-41.

¹⁹ *Ibid*, at pp. 15-16.

²⁰ *Op. cit.*, n. 18 at para: 44, p. 704.

agreement there was a default rate of 5p per page but publishers were still free to set their own rates²¹. Christopher Floyd QC, Chairman, of the Tribunal, reinforces the difficulty with CLARCS very effectively by stating –

... On the one hand the publishing industry depends on academic authors for much of its raw material. If education is burdened too heavily with copyright restrictions, teaching is inhibited and scholarship is discouraged, to the disadvantage of the public interest in general, and the publishing industry in particular. It is a good example of a symbiotic relationship²².

Criticisms of CLARCS in the present case

CLARCS was very expensive to administer and CLA's cost of administering CLARCS clearance for HEIs amounted to a figure of £355,000 for 2000-01. This is approximately £189,000 for direct costs and approximately £166,000 for indirect costs re-allocated from other departments. There is also a great deal of administration on the HEI's side. As such, CLARCS is much more expensive than the blanket licence to administer as Mr. Shepherd, Chief Executive of CLA, accepted in cross-examination during the trial.²³

In order to portray the administrative problems thrown up by CLARCS, UUK called a substantial body of evidence in connection with the practical problems which clearance of Course Packs has given rise to. Elizabeth Gadd, an Academic Librarian at Loughborough University, referred to the HECA licence in operation at the time stating that it was 'unnecessarily complex, necessitating a great volume of additional burdensome copyright clearance both through CLARCS and direct to publishers'²⁴.

Miss Gadd had also carried out a questionnaire survey to find out how effective CLARCS was proving to be amongst other HEIs. In presenting her evidence, she stated that the comments from respondents revealed that the system under the licence in operation was 'slow to respond to e-mails' and quoted from one university: 'CLARCS printed material

²¹ The information on CLARCS is taken from the evidence given by Mr. Peter Shepherd, the Chief Executive and Company Secretary of CLA at the *UUK v. CLA* case, paras: 67-81, pp. 709-711.

²² *Op. cit.*, n. 18 at para: 39; p. 701.

²³ *Ibid.*, paras: 67-69, p. 709.

²⁴ *Ibid.*, at para: 76, -. 710.

service was appalling just after the 1998 re-negotiated licence came in to force. CLARCS printed material service evidently could not cope with the volume of requests from all HEI institutions at the start of the current academic year ...²⁵.

Justifications for the CLARCS system

CLA's main justification was that the blanket licence fee being paid at the time did not cover the production of Course Packs and pointed out that Course-Packs should be the subject of a separate payment and individual clearance through the CLARCS. This stems from the very obvious point that publishers are disinclined to encourage copying, which would cripple sales of published editions from which copies are taken. Therefore, CLA's justification for maintaining the CLARCS two-tier system for Course Packs was (a) Course Packs are a substitute for textbooks and so need special control and fees, and (b) that valuable distribution and market research information is gathered by CLARCS²⁶.

CLA also drew the Tribunals' attention to a case from Australia – *Copyright Agency Limited v. University of Adelaide*²⁷ - in which the Tribunal acceded to a request to set a separate rate for Course Packs. The Australian Tribunal was faced with a claim that 'anthologies or compilations of licensed copies bound so as to resemble books known as 'Course Packs' which are sold to students in university bookshops at their approximate cost' should be subject to a different and higher rate per page²⁸. However, this definition is much tighter than the UK's licence, which was in contention. Also it does not appear to have been suggested that any advance clearance system similar to CLARCS should be implemented for this purpose.

Royalty fee

In the foregoing pages, under the title of 'How the interaction between HEIs and CLA came about: An introduction', the manner in which the blanket licence fee rose from £1.475 in 1990 to £3.25 in 1998 was set out. The HECA licence states that blanket licence fee will rise annually according to the Retail Price Index (RPI). It is not the intention to enter a discussion on the technical basis on which the blanket licence fee was arrived at. Suffice to say that during the case CLA requested a fee of £10.25 per FTES taking in to account both

²⁵ *Ibid.*, at para: 77, p. 710.

²⁶ *Ibid.*, at paras: 82-90, pp. 711-712.

²⁷ [1999] ACopyT 1.

²⁸ *Op. cit.* n.18 at para: 95, p. 713.

the blanket licence and CLARCS, which was of course vehemently opposed by UUK, who advocated a starting figure of £2.75²⁹. Both figures reflect extreme expectations on the licence fee, and as such it is interesting to consider how the Copyright Tribunal settled the matter.

CLARCS and royalty fee – The Tribunal's decision

In arriving at his decision, Mr. Floyd also referred to the Whitford Committee's Report presented to Parliament in March 1977. Making reference to paragraph 268 of that Report he further added –

'We feel that the fact that 'education' is a good cause is not in itself a reason for depriving copyright owners of remuneration. Nobody suggests that the makers of notebooks, compasses and rulers should supply these products to educational establishments free of charge . . . The majority of educational submissions were in fact of the view that, although they should be completely free to copy, it is right that they should pay copyright owners a reasonable fee in respect of the reproduction of copyright material'³⁰.

The Tribunal pointed out that the 'reasonableness' or otherwise of the Course Pack system formed a major part of this litigation. He also went on to say that this issue 'cannot be divorced from that of royalty'³¹. Mr. Floyd QC also stated that CLA should have realised that the Course Pack system was not meeting the needs of the Universities, and placed a heavy administration burden on them. As such, the Tribunal ordered that Course Pack copying and requirements for CLARCS be removed from the HECA Licence with effect from 1 August 2001. Mr. Floyd decided that the two-tier system was simply too complex and bureaucratic and ordered that the Course Pack system be removed and replaced with a single tier blanket licence scheme. In connection with the licence fee it was decided that the royalty will be set at £4 per FTES (£2.75 basic fee [reduced from £3.25] + £1.20 fee for Course Pack copying + 0.05p for separate artistic works)³² although shortly afterwards this fee was raised to £4.25 and then to £4.42. Mr. Floyd also ordered that the Respondent, CLA,

²⁹ *Ibid.*, para: 175, p. 726.

³⁰ *Op. cit.*, n. 18 at para: 40, p. 703.

³¹ *Ibid.*, at para: 177, p. 726; Final Decision delivered on April 3rd 2002.

³² See also, new specimen licence on CLA website at http://www.cla.co.uk/have_licence/support/he-support-licence.html (last accessed 10 August 2006).

pay the Applicant, UUK the sum of £100,000 by way of an interim payment of the Applicant's costs.

Analysis and Conclusion to Part one

The key question is whether the fee that was being claimed by CLA was 'reasonable' in light of the present arguments? This then raises the questions following from this.

- Was it 'reasonable' to request a separate payment for 'Course Packs' or was it 'reasonable' enough that the blanket licence fee that was being paid was a fair remuneration to the copyright owners?
- In distributing the revenue collected from organisations such as HEIs, was the CLA carrying out a fair distribution of the surplus?
- Had CLA gone one-step-too-far in requesting payment over and above what was being paid by educational establishments?

CLA has strongly contended that the case was a result of poor negotiation; that if UUK felt so strongly about the Course Pack scheme, which had been in operation since 1993, UUK should not have agreed and concluded the 1998 licence. CLA point out that after the licence was signed in 1998 – 18 months later – UUK wanted to re-open negotiations, which understandably from CLA's point of view, was unsatisfactory especially because UUK had agreed to the CLARCS system in the first place. From UUK's point of view they have always maintained that the powerful and monopolistic position of CLA led them to dominate the negotiations and conclude the 1998 licence. Furthermore, the survey carried out by the Centre for Legal Education, after the 1998 licence was concluded, made HEIs realise the many 'negatives' embedded within the licence which had to be addressed. Therefore, to address the negatives, the domination and monopolistic nature of CLA, UUK re-opened negotiations which ultimately led to *UUK v. CLA*.

What, it may be asked, is the real significance of this case to the present discussion? The case clearly signifies the striking 'take-it-or-leave-it' approach adopted by CLA. In view of this the writer wonders what the position would have been for HEIs if UUK had not acted on the behalf of HEIs? On the other hand the case also reflects that where collecting societies are seen to 'abuse' their dominant position, the UK has an effective regulatory system in

place whereby the case can be taken to the Copyright Tribunal to be judged fairly³³. The one thing that is clear is that the interaction between HEIs and CLA is beneficial for both parties. It is almost impossible to conceive the position right holders and users would be in in the absence of a collecting society such as CLA. However, where such a collecting society attempts to take action purely on a commercially advantageous basis, copyright law has shown that such motives will not be tolerated.

PART TWO:

A Case Study into the Collection and Distribution of Licence Fees of CLA

Part Two of this paper will commence by taking a look into select Annual Reviews of CLA. The years 1999, 2003 and 2004 have been chosen for this purpose. The reasons for selecting these years for the study are that 1999 was the first year that the renewed HECA licence came in to force. Also, 1999 was the first year that CLA implemented their Survey System in connection with HEIs. Therefore, with so much activity going on between CLA and HEIs during 1999, it seemed an obvious starting point. The year 2003 was chosen, as it was the year following the *UUK v. CLA* case. With changes made to the licence and CLA having paid a hefty court bill, the aim in picking 2003 for analysis was to consider the impact that this case had had on CLA. Finally, 2004 was picked, as it is the year with the most up-to-date information available at the time of writing this chapter. Furthermore, the Annual Review of 2004 tackles certain issues in relation to distribution, which were never addressed before. As such, the aim of this section is to present a comparative view of the developments in relation to distribution activity between the years 1999-2004.

A survey carried out in 1999 by Alan Story, a lecturer at the University of Kent in Canterbury, pointed out that the ALCS received £180,000 for distribution from CLA. The

³³ For more discussion on the Copyright Tribunal, see, James J.E.R. & Norris A., A Common Thread in Copyright Collective Licensing (1998) 9(5) *Ent. L.R.* 205-207; Fry R., Copyright Infringement and Collective Enforcement [2002] *EIPR* 516-524; Freegard M. J., *Quis Custodiet?* The Role of Copyright Tribunals [1994] 7 *EIPR* 286-292; About the Copyright Tribunal at <http://www.patent.gov.uk/copy/tribunal/triabout.htm> (last accessed 10 August 2006).

findings of this survey were published in an article in *The Times Higher Education Supplement*³⁴. In this article the following findings were set out –

... Investigation in to collection, calculation and disbursement of revenues under the accord shows that most academic authors receive little more from it than the proverbial book token . . . the CLA is misleading academics in to thinking they are receiving proper compensation for their published work when it is photocopied . . . CLA's Annual Review for 1999 shows that the higher education sector channelled £5 million into the agency. As of December 1999, the ALCS had been given about £180,000 by the CLA in the first year of the agreement for the photocopy of articles from journals and magazines . . . none of the funds had been distributed to academics as of December 1999. Publishers, by contrast, have been reimbursed.

CLA strongly maintained that the above article with its findings was 'factually inaccurate and misleading'. CLA's response to this allegation was –

In the financial year just ended, CLA collected a total £24m in copyright fees and distributed a total of £23m (unaudited figure). Of the £20m distributed inside the UK, £7.5m went to authors and £12.5m to publishers. Of the £4.9m in fees collected in HE, 1.1m was paid to overseas right holders, £2.4m to UK publishers and £1.4m to UK authors. The HE figures relate to fees collected in UK HE which is not the same as fees due to UK academic authors. A significant proportion of the material copied in HE is by authors who are not academics or British . . . the figure of £180,000 comes from ALCS and relates to the fees due to UK authors of journal articles only³⁵.

Thereafter, a number of 'table-tennis' articles were written on this topic, all of which were published in the *Times Higher Education Supplement*³⁶. Whilst some of these articles involved attacks on CLA others, which were responses by CLA, attempted to break down these allegations. These articles, with their attacks and responses raise two issues. The first

³⁴ Patel K., 'Authors Missing out on copyright fortune, (19 May 2000) *Times Higher Education Supplement* at <http://www.thes.co.uk> (last accessed 10 August 2006).

³⁵ CLA Press Release, Authors not missing out on copyright fortune (01 June 2000) at http://www.cla.co.uk/media/press_releases/press46.html (last accessed 10 August 2006).

³⁶ Shepherd P., 'Licence to fulfil (09 June 2000), Currie Jennifer, "CVCP 'mystifies' copyright body with a tribunal appeal" (28 July 2000); Philips Dafydd Wyn, 'Copyright wrongs' (22 September 2000); Morris Sally, 'Authors identified' (29 September 2000). All published in *Times Higher Education Supplement* at <http://www.thes.co.uk> (last accessed 10 August 2006).

is why have these allegations been made against CLA? Are there concrete reasons for these charges and if so what are they? Secondly, should CLA remunerate academic authors who contribute to journals in the form of articles? Does CLA, through the ALCS, attempt to remunerate authors of books *per se*? Does this obligation actually extend to journal articles as well? What is the real position where authors are concerned? These questions are considered in the course of the following discussion.

Annual Reviews of 1999, 2003 & 2004

Annual Review 1999

First and foremost, the Annual Review 1999 is silent on the distribution of licence fees to authors of journal articles. In response to the allegation made in the above mentioned article entitled 'Authors missing out on copyright fortune', CLA issued a press release and clarified the position by confirming that the £180,000 distributed by ALCS related only to journal articles copied and certainly not to authors of books. CLA confirms that £1.4m was paid to UK authors out of the £4.9m licence fee collected. The curious thing is that the figures that CLA quote in the press article for 1999 are a far cry from the statistics published in the Annual Review 1999.

Problems appear to arise because the Annual Review relating to 1999 shows that whereas every other item of the accounts is broken down into sub-headings the licence income available for distribution is not – probably one of the reasons, which led to a negative finding. For example, it is not possible to know the amount of licence income ALCS received for distribution to authors or how much of the licence fee collected from HEIs reached PLS. The accounts simply state that £x came in to CLA from HEIs and £y was distributed in year z. In relation to this issue, it is interesting to note that at the time of the *UUK v. CLA* case, the HEIs requested a breakdown of the licence income which would reflect how much reached ALCS, PLS and DACS. CLA refused to disclose such information, pointing out that it was confidential and also that they were not required to do so by the law. Article 63 of the Articles of Association of CLA supports this argument –

A copy of every balance sheet (including every document required by law to be annexed thereto) which is laid before the Agency in General Meeting, together with a copy of the Auditor's report, shall, not less than twenty-one days before the date of the meeting, be sent to all such members as are entitled to receive notices of

General Meetings of the Agency. Provided that this Article shall not require a copy of these documents to be sent to any person of whose address the Agency is not aware³⁷.

The Articles of Association of CLA go on to describe a 'member' of the Agency as –

Any society, guild, association or other body (whether corporated or incorporated) which, in the opinion of the Board, represents a substantial number of Copyright Owners entitled to an interest in any of the rights for the time being subject to a function being carried out by the Agency, shall . . . be eligible to be admitted to membership of the Agency³⁸.

HEIs are not necessarily 'members' of CLA; HEIs under UUK negotiate licences with CLA for the use of CLA's copyright repertoire and as such do not fall in to the category of copyright owners, which in turn means that they are not eligible to view a copy of balance sheets prior to a General Meeting. It is most probably for this reason that CLA declined UUK's request for a breakdown of licence income to the ALCS, PLS and DACS. However, because HEIs do not know whether the money, which they inject in to CLA appropriately, reaches authors, publishers and artists, it has constantly raised issues of transparency of CLA's distribution system, which has been considered below.

The information available to the public indicates that after the gross fee is collected, a certain amount is deducted for 'subvention income'. 'Subvention income' provides the running costs of CLA. The copyright owners decide the amount that should be deducted from their licence fees for the running of CLA. At present subvention income of CLA is 11.7%. This means that CLA distributes nearly 90% of licence income. Subvention income is usually set for 3-5 years and if CLA is not happy with the set amount, it is possible to request from right holders an alteration in the running cost, although this remains a rarity³⁹. The costs accounted for under subvention income amongst others include the costs of staff members; field officers; accommodation; marketing and advertising; IT expenses; costs relating to the negotiating of licence fees; distribution of licence fees; and monitoring and surveying organisations.

³⁷ Articles of Association of CLA. In accordance with Companies Acts 1985 and 1989.

³⁸ *Clause 4* of Articles of Association, CLA.

³⁹ Information received from CLA, Scotland.

Where subvention income is less than the annual expenses, CLA utilises the interest earned on the money awaiting distribution to cover the operating deficit. The interest earned on undistributed licence income is known as investment income. The fact that the interest earned on undistributed fees should go towards reducing CLA's operating deficit has raised an important question. For example, at the time of distribution should authors receive the interest on undistributed fees? In the 1999 annual review, under the heading 'operating costs' it goes on to say –

Administration costs were £2.6 million in 1998-99 and as such were within the figure budgeted for the year⁴⁰.

If this is the case (the operating costs being covered by the subvention income budgeted for that year), then it is difficult to comprehend why the interest from undistributed fees should go towards reducing the operating deficit of CLA. A deeper insight in to the operating costs breakdown for 1998-99 reveals that it adds up to £1,184,936 million – certainly not to £2.6 million, a difference of nearly a million pounds which further questions the use of interest for reducing operating costs.

The obvious explanation offered for the year 1999 would be that at the time of publishing the annual review for 1999, and due to a tri-partite agreement of 1999, there was undistributed income of £16,063,265m.

The distributions programme for the year had been held back due to the delay in finalising the new Tripartite details⁴¹.

Over and above this reasoning, CLA claims the fact that the interest from undistributed licence income is used for the operating deficit of CLA is a matter of accounting policy. CLA's reasoning signifies that whether the interest is used for reducing the operating deficit of CLA or for increasing the amount of royalties available for distribution, the end result is the same. CLA illustrates their argument with the following figures:

Assuming that the subvention income is less than the expenses: £100 = royalty; £10 = interest; £25 = expenses

⁴⁰ *Ibid.*, at p. 23.

⁴¹ *Ibid.*, at p. 10.

Interest to go towards copyright owner

£100 (royalty)
£ 10 (interest) +

£110 (distribution income)
£ 25 (expenses of CLA) -

£85 (for distribution)

Interest retained to reduce operating deficit

£25 (expenses)
£10 (interest) -

£15 (remaining operating deficit)
£100 (royalty) - £15 (operating deficit)

£85 (for distribution)

These figures produced by CLA use different formulae producing the same result, revealing that both methods go towards reducing the operating deficit of CLA. This raises the issue as to why CLA incurs an operating deficit every year, especially when the subvention income is budgeted according to the expenses. Also, as noted above, the subvention income is reviewed every three years and where it is felt that it is insufficient to cover the operating costs, CLA can notify it to the right holders and seek an increase. This would be more favourable to authors, whose licence income may not be as high as that of the publishers. Subvention income is a flat rate agreed upon by the right holders, whereas the interest generated on the undistributed licence income, will differ according to the different categories of right holders, which could work to the detriment of some copyright holders. Interest accrued on licence income will differ according to when it is distributed – therefore, it is a question of timing. The longer CLA retains the licence income, the higher the interest will be on the licence income, which in turn will be beneficial to CLA. As far as the author, is concerned, it is income due to the author, which is being held back for the benefit of CLA. The table below clearly makes this point clearer –

Fee Revenues and Distributions – year ended 31 March 1999⁴²

	1999 £	1998 £
Gross fee collections	22,681,605	19,141,132
Less: subvention	(1,796,944) -	(1,732,372) -
Adjustment for accrued subvention	250,000 +	250,000 +

⁴² CLA, Annual Review 1999 at http://www.cla.co.uk/media/annual_review.html at p. 19 (last accessed 10 August 2006).

	21,134,661	17,408,760
Total operating income	1,885,979	1,822,361
Net operating expenses (subvention income + total operating income)	2,619,279	2,25,542
Operating deficit	733,300	503,181
Undistributed fees brought forward	9,830,330	8,597,632
Fees available for distribution	30,964,991*	26,006,392
Distributions	(14,901,726)* -	(16,176,062)
Undistributed fees carried forward	16,063,265	9,830,0330
Interest receivable (on undistributed fees)	678,219	465,364

Whilst the table above illustrates the manner in which the distribution of licence income works subject to subvention income, operating income, interest etc., it also throws up a number of questions. A pressing question is how does one know what has happened in the distribution of licence income, especially in the columns which have been highlighted with an asterisk (*). The information available merely reveals how much was distributed and how much has not been distributed – the amount being bundled in to one big figure. From the figures set out above, it is not possible to get an idea as to how much was distributed to ALCS, PLS or DACS, which even though not required by law⁴³ raises questions about transparency. Therefore, if allegations of lack of transparency against CLA are being made based on the information available, it is understandable that the wrong conclusion could be arrived at as there is a lack of precise information as far as distribution of licence fee is concerned. Yet, a closer look at CLA's accounts reveals some interesting facts. In the last page of the accounts section, under the heading titled 'Related Parties', the following is set out in small print –

⁴³ *Supra*, p. 204.

... The Company also charged PLS for certain services provided to it during the year, including accounting assistance and computer systems access.

Transactions with ALCS and PLS amounted to £5,815,310 and £7,682,953 respectively.

Amounts due to ALCS and PLS are included within undistributed fees. However the amount is not quantifiable until the work of analysing the copying, which has taken place over the period, has been completed.

Furthermore, the Annual Review 1999 offers diagrams, which represents the ‘Gross Fee Collections’ and ‘Distribution of Copying Fees to Members and Foreign RROs’ from 1992-1999. These graphs show that there is a significant difference between the fees collected and those, which are distributed. The following graphs are illustrative of the point –

Figure 3 - Gross Fee Collections – All sources (£ millions)⁴⁴

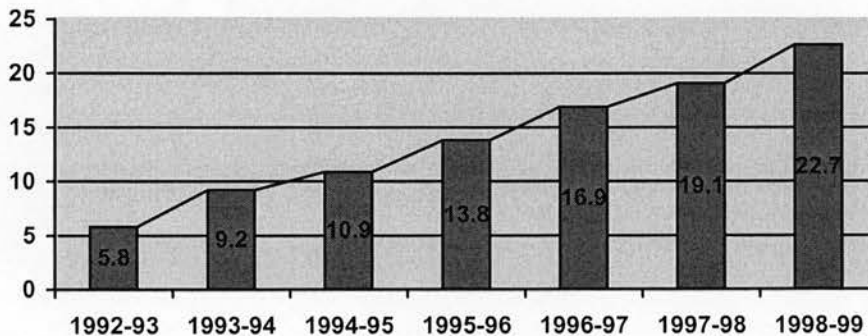
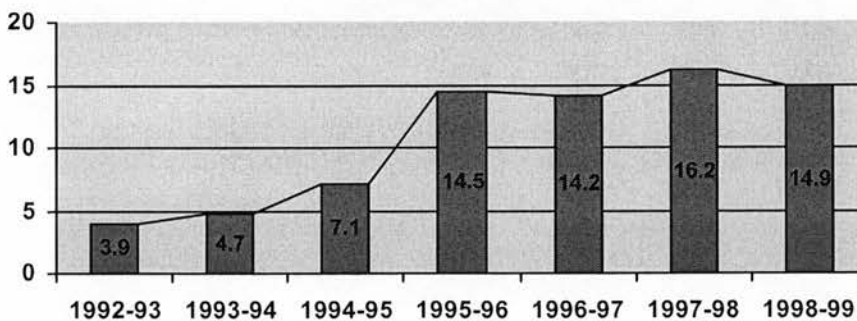


Figure 4 - Distribution of Copying Fees to Members & Foreign RROs (£ millions)⁴⁵



⁴⁴ CLA, Annual Review 1999 at http://www.cla.co.uk/media/annual_review.html at p. 14 (last accessed 10 August 2006).

⁴⁵ *Ibid.*, at p. 15.

The most important point that can be drawn out from the above two graphs is that the distribution graph varies significantly from the income graph, with the sole exception of 1995-96. Whilst the 'gross fee collection' graph shows a consistent rise in the collection of licence fee, reflecting stricter copyright compliance within HEIs, the distribution graph is extremely inconsistent and does not show any form of proportionality to the collections graph.

That aside 1999 was a significant year for HEIs as it was the first full year, which saw the new blanket licence scheme in operation along with the Course Pack clearances through CLARCS. With this new development in place, the 1999 Annual Review stated that the –

CLA is in a unique position. In 1999 we have used that position to establish a copyright working group with representatives of the HE sector and to bring pressure to bear on the high-street copy shops for the part they play in the evasion of the fees rightfully due to right- owners'⁴⁶.

Given this information, it is interesting to note from the Chief Executive's, Report in the Annual Review 1999 that CLA broke the £20 million per year barrier for the first time by generating a fee income of £22.7 million (£19.08m from UK, £3.6m from overseas) – 18% higher than the previous year⁴⁷.

On the one hand, these facts are reflective of stricter copyright compliance within organisations, which is undoubtedly a positive thing. On the other hand, it raises the kind of concerns that were highlighted by Alan Story and published in *The Times Higher Education Supplement* as well as those about an abuse of a monopoly position. The Chief Executive of CLA addressed at least one of these concerns when he admitted that in respect of the distributions, CLA fell short of its target by £14.9m in 1999. After playing catch-up, a further £19.2m was admittedly distributed⁴⁸. However, the situation remains unclear as the Annual Review then goes on to say that the balance of undistributed fees carried forward was £16.0m. The reason given for this is that in any given year the fees received by the Agency cannot be distributed to members and other Reproduction Rights Organisations

⁴⁶ *Ibid.*, at p. 4.

⁴⁷ *Ibid.*, at p. 3.

⁴⁸ *Ibid.* The reason for the delay CLA explained was due to finalising details of the Tripartite Agreement.

(RROs) until the work of analysing the copying which has taken place over the period has been completed. CLA therefore has the right to hold substantial sums, which are in the process of being allocated to its members and foreign RROs. Although this may make sense, the many different figures of £14.9m, £19.2m and £16.0m do not give the impression of a clear system of distribution.

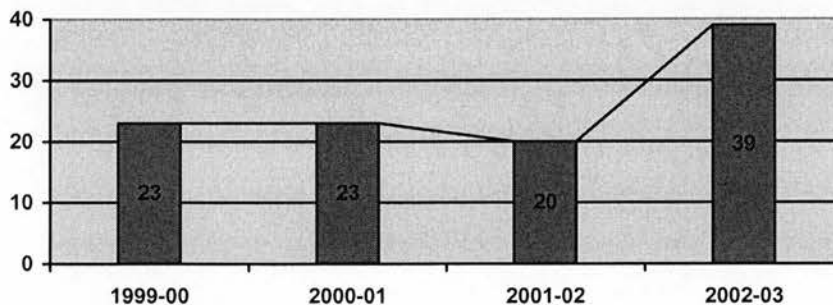
It is possible that CLA may not have fared as well as they would have hoped with the Higher Education Copying Accord with its new clauses coming in to force in 1999, coupled with the fact that 1999 was the first year that the survey scheme was in place. However, a look at the Annual Review between the years 2000-2004 reveals a similar story.

Annual Review 2003

In the same year that CLA celebrated its 20th anniversary and the case of *UUK v. CLA* was settled, in favour of UUK, CLA also recorded cumulative distributions to right holders, exceeding £188 million. The reason for such a large distribution figure stemmed from the fact that distributions had been withheld whilst CLA awaited the result of the Copyright Tribunal in the *UUK v. CLA* case. It was the first time in the history of the CLA that distribution has been at such a high with a distribution total of £38.7 million being distributed in the twelve-month period.⁴⁹

The graph below shows the scale of distribution in the years 1999/2000 – 2002/2003.

Figure 5 - Fee Distributions 1999-2003 (£ millions)



⁴⁹ See, CLA Annual Review 2003 at <http://www.cla.co.uk/about/review-03.pdf> at p. 18 (last accessed 10 August 2006).

Furthermore, in the Annual Review 2003, under a heading titled, ‘Where the distribution money goes’ an explanation is offered – also a first – which goes on to say –

CLA distribute the fee revenue for UK right holders to ALCS, PLS and DACS, split in proportions agreed between the societies, and for foreign right holders to their national RRO. Each society in the UK completes the distribution to right holders according to its own procedures determined in consultation with its members. CLA provides a bureau service to PLS for completing the publisher distributions.

Unfortunately, this is information that is already known and does not shed new light on what *really* happens to the collected revenue? Once again, the accounts section at the back of the Annual Review provides a more detailed account of the distributed income, although it does not specifically state how much was distributed to each collecting society (i.e. ALCS, PLS and DACS); the accounts simply state that the distributions amounted to £38,704,380 out of £54,711,984 which was available for distribution and that the undistributed licence fee stands as £17,459,753. Interestingly, unlike in the 1999 Annual Review where there was some indication given in relation to the transaction costs between CLA and ALCS and PLS, the 2003 Annual Review does not offer such information. The first question, which comes to mind, is whether £38,704,380 is 11.7% of £54,711,984? It certainly is not. In fact, the subvention income for 2002/03 was accounted at £4,368,040, a huge increase from 1999. Even if a further 5% is added to this figure, and this new figure is deducted from the total collections, the arithmetic does not work accurately. In light of these findings how does CLA justify the difference in collections and distributions of licence fees?

There are once again grey areas⁵⁰. It is also interesting to note the flow of distribution between the years 1999 -2003. In the late 1990’s CLA’s distributions were at an average of £15 million. This figure rose considerably following the completion of the HECA Agreement in 1999 and in the years 2000-2002 were at an average of £22 million. Following the case of *UUK v. CLA*, distribution reached an all-time record of £39 million. As indicated earlier the reason for this was that distributions were kept on hold until the outcome of the case.

⁵⁰ See, n. 49 at p. 23.

Following the case and in support of CLA, Gerald Cole, an author-director of CLA and a former lecturer and researcher in Higher Education, emphasised CLA's advantages and claimed –

Collective licensing provides a framework within which copying can be controlled and paid for. Users do not have to seek clearances from individual publishers or authors but can channel their requests through a collecting society, which will also handle the financial transactions on their behalf. Authors and publishers can be assured of receiving fees from the collecting body . . . The community as a whole must face up to its responsibilities to those who contribute to the nation's intellectual capital⁵¹.

Annual Review 2004

As a result of the discrepancies relating to distribution of remuneration owed to right holders and the lack of transparency in this respect CLA has continuously come under much criticism in the recent past. Therefore it is encouraging to note that the Annual Review of 2004⁵² has taken a firm stance in relation to the issue of transparency in the distribution of licence income. Furthermore, transparency in the distribution methodology has been given special attention in the 2004 Annual Review. The Chief Executive of CLA, Peter Shepherd, states in his Executive Report of 2004 that –

Transparency in distribution methodology is now a primary aim of CLA . . . The first step taken to meet this goal was to develop a set of distribution aims . . . As a result individual rights holders will be able to understand how the distributions of fees are calculated in each of CLA's revenue sectors⁵³.

In keeping with this aim, the Annual Review 2004 sets out the first-ever Distribution Aims adopted by CLA⁵⁴. They are as follows –

- (1) The aim of the distribution policy is to enable the distribution of funds collected by CLA to authors, visual creators and publishers in respect of copying under its licences;

⁵¹ CLArion, *Newsletter of the Copyright Licensing Agency*, Winter 2002 p.2.

⁵² Annual Review 2004 at <http://www.cla.co.uk/about/review-04.pdf> (last accessed 10 August 2006).

⁵³ *Ibid.*, at pp. 2-3.

⁵⁴ *Ibid.*, at p. 7.

- (2) CLA will obtain, so far as is reasonable and practicable, information on actual or estimated copying of individual works and/or types of works copied under licence;
- (3) CLA will obtain such information through such methods and such data collection exercises as may be deemed appropriate having regard to the feasibility, cost and/or accuracy of the methods chosen;
- (4) CLA will work closely with rights holder organisations to agree on the quality, detail and volume of data for each of its licence sectors;
- (5) CLA will disburse its revenues to UK and overseas rights holder organisations in accordance with its contractual obligations to them for onward distribution by them. At the same time CLA will provide them with the relevant information obtained;
- (6) Rights holder organisations shall be responsible for determining the distribution policy to be implemented in their own distributions; and
- (7) CLA commits to the principles of clear, transparent and comprehensive documentation of its data collection and distribution methodologies.

These distribution aims are certainly a step in the right direction. The seventh aim in particular rounds up all of the aims by committing to principles of clear, transparent and comprehensive documentation of its data collection and distribution methodologies. Whilst transparency in distribution of licence income is an important aim, it is the author's opinion that transparency in general is also very important. This means that licensees of CLA should also be eligible to receive information on the manner in which licence income is distributed and how much reaches ALCS, PLS and DACS. The justification for this argument is that the licensee is in direct contact with CLA and not with ALCS, PLS or DACS and it is only fair that since universities as a whole inject £5 million in to CLA they are kept informed as to where the money is going and this is achieved through principles of clear, transparent and comprehensive information. Whilst the Report on the one hand provides aims to improve the issue of transparency and distribution, on the other hand, the accounts of 2004 make a statement in relation to the 'Accounting Policies', which makes matters even less transparent than before. The Accounting Policies states that –

The following principal accounting policies have been applied consistently with the exception of the treatment of interest receivable . . . Interest receivable is included as part of the subvention income and is not, therefore, shown separately in the income and expenditure account. In prior years interest was shown separately.

This, it is believed, adds to the lack of general transparency within CLA, because rather than clearly indicating the amount of interest received, yet another item is now 'bundled' under

the heading of subvention income. This is a further sign of CLA not breaking down the accounts sufficiently into separate headings which would assist a right holder and user in seeking what exactly comes in and goes out rather than follow the route of ‘bundling’ items under a few headings.

However, in relation to this argument, CLA maintains that it makes no difference whether the interest is included within the subvention income or not. As already pointed out in the preceding pages, CLA reasoned that whether the interest is deducted from the distribution income to cover the operating deficit or whether it is added on to the distribution income in favour of the copyright owner, the end result will be the same⁵⁵. CLA insists that it is a matter of Accounting Policy and convenience. Whilst this may be a valid argument, the issue still remains that ‘bundling’ the interest accrued on the licence fee awaiting distribution, leads to less information and lack of clarity for the licensee. The need for distribution aims to be made up of clear, transparent comprehensive documentation applies to both the user and the creator and not simply to the creator alone.

Ultimately, whatever criticisms are made in relation to CLA it cannot be ignored that CLA is doing a necessary job. If CLA did not exist one cannot begin to imagine the consequences authors and publishers in particular would have to face in today’s technologically advanced world. How can authors, artists and publishers keep track of their works, which can now be accessed, used and copied at the same time with modern technology such as the Internet? How would they deal with the high transaction costs of copyright administration? As such the importance of the CLA must be acknowledged. Yet, their tendency to abuse their dominant position as was seen in *UUK v. CLA* cannot be ignored. The lack of transparency as was illustrated by reference to CLA’s distribution activities from 1999-2004 also cannot be ignored. The problem stems from the fact that one of the characteristics of collecting societies and for example, CLA, is that it is a natural monopoly, a *de jure* monopoly, and does not face any competition, thus leading to the tendency to abuse their dominant position.

Survey Scheme of CLA

The accurate distribution of licence fees depends on data collection through surveys conducted by CLA. CLA confirm that the essence of their surveys is the collection of physical evidence of copying of individual titles, supervised by field officers at copying

⁵⁵ *Supra*, p. 206.

machines within organisations selected in a sampling of their sector. The survey data collected and analysed forms the basis for the distribution of fees paid by organisations for the copying of copyright works under CLA licences. In 2002-03 over 150,000 survey returns were processed together with a further 350,000 returns for CLA's transactional licences such as document delivery and higher education digitisation⁵⁶. As such the accuracy of the distribution of licence income depends on the survey system, which needs to achieve a high level of accuracy in collecting and analysing the data.

In support of CLA's survey system and in one of the previously mentioned press articles, which appeared in *The Times Higher Education Supplement*⁵⁷, Peter Shepherd, Chief Executive of CLA stated that –

As part of the blanket licence in higher education, surveys are conducted according to a methodology agreed with the Committee of Vice-Chancellors and Principals. These enable fees to be fairly apportioned to individual authors. The licence exists because authors and publishers in the UK trust the higher education sector to give a full and fair account of its copying. Anything less undermines an arrangement that makes it easy to copy widely legally and at reasonable cost. The licence balances the interests of copyright-holders ... and those of higher education users.

The survey methodology operates on a 'rolling survey system' and is divided in to⁵⁸ –

- (1) record keeping survey;
- (2) questionnaire survey;
- (3) information audits; and
- (4) scanning digitisation.

The record-keeping survey

The recording keeping survey is the most commonly used survey system to monitor photocopying within HEIs and comprises an analysis of photocopying copyrighted works carried out at pre-selected photocopiers. CLA confirms that every item of data that includes the title identifier (ISBN, ISSN) is monitored during surveys and the number of pages copied

⁵⁶ See Annual Review 2003 at <http://www.cla.co.uk/about/review-03.pdf> at p. 18.

⁵⁷ Shepherd P., Licence to fulfil (09 June 2000) at <http://www.thes.co.uk>

⁵⁸ Information provided by Christine Blake, Manager of Survey Operations of CLA. Her contact details can be found at http://www.cla.co.uk/have_licence/he/he_furtherinfo.html

and number of copies taken is entered in CLA's survey records⁵⁹. Before this survey is carried out, CLA would agree in advance with a licensee, the time and duration of the survey and the methodology that would be used by CLA. Furthermore, CLA would carry out research in to the particular HEI approximately a term in advance of the actual survey taking place in order to establish the number of departments and photocopiers which need to be surveyed and also to brief the librarians as to their role and duties during the time of the survey. This kind of preparatory work is usually carried out in the exam period or during the summer vacation, whilst the surveys themselves would be carried out during the busy term-time. In the Second Schedule of the Agreement concluded between CLA and HEIs in August 2005, titled, 'Trial Licence for Photocopying and Scanning'⁶⁰, the following is set out –

Unless and until replaced by a scheme to be agreed between CLA and UUK, the Survey Scheme will operate as follows:

if selected by CLA to participate in a survey:

the Licensee will within thirty (30) days notify CLA of the identity of the buildings comprising its premises (and the situation of reprographic equipment thereon);

the Licensee will co-operate in allowing CLA to set up and run surveys in such Departments and/or libraries as CLA will select and shall require its staff and students to fulfil the survey requirements. CLA will publish for distribution by the Licensee throughout its premises guidelines for the operation of a survey⁶¹.

During the time of the survey, which generally lasts six weeks within a given university, the members of the university will be asked to make an extra copy of one page identifying what it is that they are copying. They then record the number of pages copied (and the number of copies made) on a label supplied by CLA, which the user then sticks to the page and places in boxes located at these copiers. CLA field officers collect these at regular intervals. At the same time, meter readings of the pre-selected photocopiers are recorded. Data analysis by CLA of this information assists CLA to distribute licence fee revenue to the appropriate authors, artists and publishers.

⁵⁹ CLA Annual Review 2003 at <http://www.cla.co.uk/about/review-03.pdf> at p. 18.

⁶⁰ Clause 8(a) is also relevant in this context. The Licence can be viewed at <http://www.cla.co.uk/support/he/index.html> (last accessed 10 August 2006).

⁶¹ Schedule 2, 'Surveys and Record Keeping' Trial Licence for Photocopying and Scanning, August 2005

The questionnaire survey

A questionnaire survey consists of a series of short, informal face-to-face interviews about photocopying practices based on a diary of copyright photocopying conducted over a short period, and involves only an agreed sample of employees.

Information audits

Information audits use the Licensee's holdings and subscriptions including departmental subscriptions, of books, journals and magazines. In conjunction with questionnaire surveys, this data enables CLA to calculate fair distributions to rights holders. Once complete, Licensees will only be asked to update their catalogue of holdings and subscriptions to CLA every three years.

Scanning and digitisation

Where scanning/digitisation of copyright material additionally is permitted under the Licence, Licensees may be required to record bibliographic details and levels of use. Collection of this information may form part of the data collection exercise undertaken for photocopied copyright material. It may not necessarily be carried out during the same period.

An Analysis of the Survey System

There are a few points that can be taken from the information on the survey process set out above. The first is a general observation in relation to the survey system. According to the survey system CLA field officers monitor pre-selected photocopiers at selected universities over a period of six weeks. However, the issue arises as to whether there is a system whereby CLA field officers decide which universities to survey in a given year. CLA's answer to this question was that it is a random selection to represent geographical distribution, so that HEIs in England, Scotland, Wales and Ireland are represented equally. The information provided by CLA illustrates that surveys have been carried out in various universities throughout UK (in total 73 universities: 61 in England; 2 in Northern Ireland; 5 in Scotland and 5 in Wales). Further enquiry at CLA returned the information that 73 universities have been surveyed since 1999⁶². It was also revealed that the CLA carries out surveys on a three-year cycle. This means that a university that is surveyed, for example, in 2006 will not be surveyed again at least for another three years, in the present example at

⁶² Survey information provided by Operations Manager, CLA.

least until 2009. In this manner CLA can ensure that as many universities as possible can be surveyed.

The drawback of the present system adopted by CLA is that whilst some universities have been surveyed twice – for example Universities of Kent at Canterbury, Manchester, York, Derby, Nottingham, Wolverhampton, East Anglia, Bournemouth, Leeds Metropolitan, Liverpool Hope University College, Falmouth College of Arts and University College London (UCL), in the last five years (from 1999-2004) other universities such as Aberdeen, Glasgow, Edinburgh, Durham, Oxford, Cambridge have not been surveyed even once even though they have been licensed with CLA since 1999. The solution to this issue is simply not to carry out the surveys in a random manner, but to have a survey list drawn up, based on geographical representation and other criteria such as the number of photocopiers and computers within a given university, number of students, number of libraries and is it an 'old' or 'new' university? Such criteria should be taken in to account in determining and categorising the various HEIs, which needs to be surveyed.

Secondly, students within a HEI are asked to make an extra copy of the first page of a journal or book being photocopied in order to identify what they are photocopying. The question that comes to mind at this point is how many officers monitor one university at any given point? We already know that they monitor photocopying at pre-selected photocopiers. Within a university such as University of Edinburgh, there are approximately 480 photocopiers⁶³. When CLA officers, come to Edinburgh University to monitor the photocopying, how many of these 480 copiers do they monitor? Is it the machines located within the eight main libraries⁶⁴ of the University of Edinburgh? CLA was unable to offer a specific answer to these queries or to identify the number of field officers involved in the survey process. CLA responded by stating that the number of field officers or the number of photocopiers surveyed at a given university will almost always depend on the size of the university and how well copying is regulated within that university.

⁶³ Information provided by Allan White, Officer in charge of Departmental Copiers, University of Edinburgh, June 2005.

⁶⁴ These include Main Library George Square; Law & Europa Library; Darwin Library; Moray House Library; New College Library; Robertson Engineering and Science Library; James Clark Maxwell Library; and Veterinary Library (Summerhall, Easter Bush Veterinary Library and Centre for Tropical Veterinary Medicine). Note that Erskine Medical Library has now moved in to the Main Library at George Square (providing services to Psychiatry, Royal Infirmary and Western General Hospital) as of 25 June 2004.

A further concern arises from the duration of the surveys, which as noted above, lasts for six weeks. Considering the fact that the distribution of licence income (which in some years has been as high as £5 million) is based purely on the survey system, it can be questioned whether six weeks is an appropriate period of time? For example, CLA's method varies vastly from Denmark's Copy-Dan⁶⁵ where 5% of the schools are surveyed for a period of twelve months. On the contrary, CLA samples 2% of educational institutions for a period of six weeks. As regards the duration of the survey, CLA is of the view that distribution of revenue would not be more accurate with more time. In CLA's opinion, six weeks is sufficient time to get a fair view of the photocopying within HEIs, although, the issues in relation to the distribution of licence income reveal another story.

A final point is in relation to scanning and digitisation. According to this system, the CLA officers will be given full access to the Secure Network (including all Course Collections) and shall be 'given facilities to inspect records, to compare a selection of scanned material with its source, to observe, monitor and evaluate the systems established by the licensee for the making of Digital Copies, for making available or distributing such Digital Copies and for maintaining Course Collections and allowing access to them'⁶⁶. This is known as 'Compliance Audit'. Similar to the photocopying surveys, if a university is selected for the purpose of carrying out an inspection pursuant to a Compliance Audit, 'the Licensee shall ensure that it and all Authorised Persons co-operate fully with the reasonable requirements of CLA relating to the inspection as set out in the Audit Plan as agreed from time to time between CLA and UUK'⁶⁷. In turn, CLA shall on giving reasonable notice have a right of access throughout the licensee's premises at any reasonable time or times in order to organise and carry out an inspection⁶⁸. The aim of carrying out a Compliance Audit is to ensure compliance with the terms and conditions of the licence, in particular, to the creation and storage of Digital Copies and access to these copies and also to monitor the moral rights of the author⁶⁹.

The survey system is an essential part of CLA's functions. Its accuracy is of paramount importance to ensure the accurate distribution of licence income. However, analysis of the

⁶⁵ Copy-Dan at <http://www.copydan.dk> (last accessed 10 August 2006).

⁶⁶ Clause 9(c) of Trial Licence for Photocopying and Scanning, August 2005.

⁶⁷ *Ibid.*, Clause (b)(i).

⁶⁸ *Ibid.*, Clause 9(c).

⁶⁹ *Ibid.*, Clause 9(a).

survey systems has raised a few concerns as to the breadth and length of the survey system. Furthermore rather than have a system based on pure random selection, CLA might benefit from a more structured system as set out above.

The next part of the paper shall provide, an analysis of the most recent licences, which have been concluded between CLA and HEIs, will be considered. The licences, which have been considered are from 2000 onwards and therefore the paper does not make any comments on or analysis of previous years. It is hoped that by giving the reader a practical view of these licences, a better understanding will be obtained.

PART THREE:

A Critical Analysis of the Higher Education Copying Accord

In line with the requirements of the HECA licence, explained in the preceding pages, the University of Edinburgh has regularly entered into agreements with the CLA for licence to photocopy and scan copyrighted works. The licence of 2001 dealt with the method of payment in *Clause 5* whilst, the survey system was dealt with under *Clause 7* of this licence.

Clause 5 – Payments

- (a) In consideration of the grant of the Licence by CLA to the HEI upon the terms and conditions hereof the HEI shall pay to CLA fees per annum per FTES of £4.00, such fee to be increased in line with the increase in the Retail Price Index on an annual basis on 1 August each year, the first such increase to take effect on 1 August 2002;
- (b) the most up to date totals for HEIs FTES shall be used for every invoice. The first invoice under this Agreement shall be issued for the period 1st August 2001 to 31st January 2002 . . . all invoices are payable within thirty days of their presentation;
- (c) all invoices raised by CLA shall be subject to Value Added Tax calculated at the rate for the time being in force.

The licence is very clear about payment, but unfortunately not about distribution. For example, HEIs would like to know that the money that is being paid by them is being appropriately distributed to authors, which is not made clear in the present agreement. During 2003-04 the University of Edinburgh entered in to another agreement with CLA to ensure copyright compliance known as The CLA Higher Education Digitisation Licence. Under this licence, *Clause 13* dealt with the payment of licence fees to CLA.

Clause 13

13.1 The CLA will invoice the Licensee for Licence Fees relating to any CLARCS Licences granted to the Licensee in accordance with Schedules 1, 2 and 3, and Licensee will pay such invoices in full within 30 days of invoice.

13.2 If any invoice remains unpaid after payment is due (but without prejudice to the provisions of Clause):

13.2.1 The CLA shall send a reminder by recorded delivery mail and if the invoice is still unpaid ten working days from the date of the reminder then any CLARCS Licences to which the invoice relates will be suspended.

13.2.1 Interest shall run on such unpaid amounts calculated from the date of the invoice at a rate of 3% above the base rate from time to time of Lloyds-TSB Bank PLC (compounded monthly).

The most recent trial licence under the HECA was launched on 1 August 2005 and will last for a period of three years. The licence is known as the Trial Licence for Photocopying and Scanning⁷⁰.

Trial Licence for Photocopying and Scanning, August 2005 – A Critical Analysis

There are a number of problems with the Trial Licence for Photocopying and Scanning, August 2005 (hereinafter 2005 Licence). For example, Clause 4(a)(iii) states that ‘Course Users’ can download and print a Digital Copy and retain an electronic copy of the Digital Copy for the duration of the Course of Study for which it has been provided. First and foremost, a Course User, is an ‘Authorised Person who is either: (a) a student enrolled on that Course of Study; or (b) a tutor, lecturer, supervisor or other person providing teaching to students in respect of that Course of Study ...’⁷¹ According to Clause 4(a)(iii), it is essential to record the data of the number of students taking a particular course, in other words the number of Course Users, who will need access to the relevant digital copies. This means that over and above recording the number of FTES within the HEI, the 2005 licence, also requires that students of separate courses be recorded for purposes of using Digital Copies. Does this also mean that if in the next year, the same course is run under a different name (change being for example, ‘Issues in Technology Law’ to Technology Law and E-

⁷⁰ The Trial Licence for Photocopying and Scanning can be accessed at <http://www.cla.co.uk/licence05.pdf> (last accessed 10 August 2006).

⁷¹ *Ibid.*, Clause 2, ‘definitions’.

Commerce'), the HEI would have to once again pay for the use of the Digital Copy? Furthermore, what is the situation for a student or course user in this scenario? If the student failed to retain an electronic copy of the Digital Copy during the duration of the Course and wanted to download it the following year, according to the Licence, he or she will not be permitted to do so.

CLA confirms that this is correct and states that even though the same Course will be run under a different name the following year, HEIs will have to pay once again. If a student fails to retain an electronic copy of the Digital Copy during that particular year and if he or she needs it an year later for his or her Honours Course, the student will not be able to access the Digital Copy, even though the student was a Course User the previous year. Apart from being very rigid in its nature, this Clause under the 2005 licence can lead to potentially administrative problems, although it is only after being put into practice that the position will become clear.

In the present writer's view, a better system would be to have different wording for this Clause, which in effect would provide the student access to the Digital Copy for the length of time the student is enrolled in the University rather than the duration of a particular Course. This is a more sensible approach and similar to the manner in which a student has access to all books, journals, and research databases within a HEI during the period of matriculation. As such, the same privileges should be extended to the student as far as Digital Copies are concerned and not restrict access, simply because the student has moved on to a higher year of study.

A second concern arises from Clause 4(b)(vii) in relation to subcontracting the making of Digital Copies to third parties, subject to certain conditions as set out Clause 4(b)(vii)(A)-(D). Clause 3(h) complements the above Clause by stating that –

The Licence does not extend to the making of Licensed Copies outside of the United Kingdom except as may be permitted by clause 4(b)(vii). Licensed Copies made by or for Authorised Persons may be sent outside the United Kingdom to overseas Distance Learners provide that nothing herein shall be deemed to authorise any further copying of Licensed Copies outside of the United Kingdom by an overseas Distance Learner. Each overseas Distance Learner shall be responsible for complying with all local laws.

In addition, Clause 4(b)(viii) states that

... For the avoidance of doubt, this Licence does not authorise scanning by Authorised Persons for their own private study or research or any purpose other than making Digital Copies available to Course Users.

In light of the above Clauses, the following scenario can be contemplated. Where postgraduate students are undertaking the Masters in Law (LLM) by distance learning at the University of Edinburgh and for instance, one of the students enrolled on the Course, from Brighton, finds a useful article (which is not available commercially), and wants to make a Digital Copy of it in order to make it available to other students of the distance learning course. The article could be accessed, downloaded and used by the students of the course. Would it be a breach of licence terms under the 2005 licence to make it available to the rest of the class? Should there be an exception to the rule of the 'Designated Person' as far as Distance Learning is concerned? A 'Designated Person' is 'any Authorised Person designated by the Licensee for the purposes of making, or causing the making of Digital Copies and placing them on Course Collections; such designation need not be by name but may be specifying the person or persons holding an office or status, which may extend to categories such as all permanent teaching staff, or all persons responsible for convening a Course of Study'⁷². Is it possible to get round this scenario by e-mailing the scanned article to the Designated Person as an attachment, who will then make it available to the rest of the students on the Course? The Licence does not make the position very clear and the Clause appears quite rigid in its nature. The only available guidance is an attached Appendix titled 'Collection and Supply of Data Records of Digital Copies'. This Appendix relates to a Licence Coordinator making entries of each Digital Copy in a Record Sheet provided by CLA. Clause 2 of the Appendix states that 'an entry is required whatever means are used to provide access to a Digital Copy, whether it is . . . by e-mailing it to students on a Course ...'. One wonders whether this gives the green light to the student in Brighton in the above example to make a Digital Copy and e-mail it as an attachment to the Designated Person in order to make it available to the rest of the Course Users.

CLA's response to this issue was that if a Course User wants to carry out private study or research that would come under 'fair dealing' according to the 1988 Act. However, this applies to the individual only and not for circulating to others or to the rest of the class.

⁷² *Ibid.*

Where a Course User wishes to circulate material as suggested in the above example, CLA confirms the only way round the clause would be to e-mail the scanned article to the Designated Person who will then decide whether it should be uploaded to the Course Collection. If the Designated Person decides to upload the scanned article, he/she must report to the CLA as there is an obligation in the 2005 licence for HEIs to inform CLA of what has been used in a Course in that particular academic year. As such, if a Digital Copy is added to the Course Collection half-way through an academic year, then CLA should be informed. This makes one wonder whether the hassle of conforming to so many regulations is really worth it. Therefore, even though CLA makes provisions for Digital Copies to be used within a HEI, it raises problems for students in distance learning courses. Others who are physically present within the University, may, ultimately turn to photocopying to avoid the inconveniences thrown up by Digital Copies.

Another clause, which leads to the licence being inflexible, is that of Clause 4(c)(i)(E). This clause basically sets out that where a Course is not likely to be repeated 'in a future teaching session', the Digital Copy made under the licence should be removed from the Course Collection. If the Course is to be resumed, a detailed check should be made to ensure that 'the copies made available to Course Users comply with the conditions of this Licence'. This seems an unnecessarily stringent clause. If a Digital Copy is made and where it is accessible by Secure Authentication⁷³, which in turn can be accessed only by Authorised Persons or Course Users, there seems to be little point in removing the Digital Copy from the Course Collection, where 'it is not likely to be repeated in a future teaching session' especially where there is the likelihood that the Course could be taught again – in which case a 'detailed check' will be necessary. What about the situation where a tutor, lecturer, supervisor or other person providing teaching to students in respect of that Course of Study goes on sabbatical leave for one year? Even if the Course is not running that year and Digital Copies are not being made as a result, would the HEIs still have to pay for use and access to Digital Copies, if such Copies are up on the system? CLA answers this question in the positive and advises that a blanket licence covers all photocopying and scanning and therefore as long as Digital Copies are up on the computing system, HEIs will have to pay. The only way to avoid payment will be to remove the Digital Copies from the system and re-scan them, following a detailed check, when the Course re-commences.

⁷³ In accordance with the Licence, 'Secure Authentication' means 'access to Digital Copies on a Course Collection by a process of authentication which is, at the time of login, identifies each user whether by user name and password or by some other equally secure method and which identifies the user's status as being a Designated Person, a Course User or other Authorised Person'.

Whilst a number of drawbacks have been highlighted, it is important to draw attention to some useful clauses in the 2005 licence. In protecting copyright law, clauses 4(b)(iv) & (v) emphasise that Digital Copies should only be accessible by Secure Authentication and unless as permitted by the Licence, ‘no other copying, dissemination, publication, communication or making available to the public, repackaging, distribution, in any form of Digital Copies, in whole or in part, is permitted’. Clauses 4(c)(ii)(A) & (B) supplements the above clauses and also implement appropriate controls and safeguards over the use of Digital Copies:

- (a) Only Designated Persons may make, or cause the making of, Digital Copies and place them on the Course Collection;
- (b) Whilst all Authorised Persons may view Digital Copies held in the Course Collection, only Course Users may download and print out Digital Copies.

Finally, in relation to the payment per FTES, it must be pointed out that scanning unlocks a new world of information for HEIs. For this privilege, and for cutting out the administration problems of having separate licences for photocopying and scanning, by having a single licence, the fee has gone up by £0.50, the new fee being £4.92. However, there is always the possibility for the fee to increase in accordance with the Retail Price Index on 1 August each year. It is true that it is almost £5 per FTES, yet, with the amount of information that is available for that price, it does seem worth it. Time will tell whether the latest HECA outfit is in tune with modern times or not.

Analysis and Conclusion

A useful starting point to conclude this chapter is the Green Paper of 1995 Copyright and Related Rights in the Information Society⁷⁴ which identified the structure and management of copyright collecting societies and states –

The usefulness of collective management, where appropriate, is not called into question, either now or in the future. A number of parties, however, call for harmonised measures to adequately control the behaviour of collecting societies, both in terms of licensing and competition rules. Some ask specifically for a clarification of the application of ... competition rules to collecting societies and

⁷⁴ COM(95) 382 final, *supra* p.7.

collective management, possibly through a code of conduct or voluntary guidelines⁷⁵.

The above quote appropriately points out the benefits of collecting societies such as CLA but at the same time highlights the pitfalls, which can arise from lack of transparency, competition and good governance. CLA performs an important function, without which, right holders would find themselves in a very difficult situation, especially in the digital age. However, the irony is that when ALCS and PLS came together to set up CLA in 1982, the main objective behind this amalgamation was to have a single point to assist both right holders and users in the dissemination and use of copyright works. It is this very single point, which has ultimately raised a number of concerns in relation to the abuse of dominant position (as was seen in the *UUK v. CLA* case) thus creating a need to introduce competition to curtail such anti-monopolistic behaviour.

In Part II of this chapter, the Annual Reviews of CLA were examined and some grey areas were highlighted. One of the recurring questions in this part of the chapter was where does the money go? In other words what happens to the money, which is injected from HEIs for example? Does it all go to the publishers? Do authors of books and journals benefit from being members of CLA? It is interesting to note that until 2005, it was accepted that if a publisher of a journal, was able to prove 75% ownership of the journal articles (as a result of authors assigning copyright to the publisher), then the publisher will be entitled to the royalties arising from the journal. In 2005, this rule was changed in favour of a 85/15 split in favour of the publisher. CLA confirms that as of June 2005, the proof-test does not exist anymore, but in its place authors of journals will receive 15% of the royalties whilst the publisher will enjoy 85%. However, in practice, this could prove to be a different story altogether with academic authors receiving no royalties as a result of contracts signed with the publisher.

Reflecting on the above arguments, the single most important point, which can be drawn out, is that collecting societies were created to reduce transaction costs and create a single body, not an abuse of monopoly position.

⁷⁵ *Ibid.*, at p. 26.

The formation of collective societies to administer copyrights is an efficient means by which the transaction costs can be greatly reduced, since most of the creations in each collective have the same set of users. Hence, even if it is not profitable for individual copyright holders (who are quite successful) to negotiate their intellectual property right with the user set, doing so collectively with each member of the collective bearing only a fraction of the cost can make transactions feasible and worthwhile⁷⁶.

However, it appears that the ‘historic’ transaction cost advantages (from the market failure point of view) will decline as digital technology continues and this in turn will bring the effectiveness of and need for collecting societies in to the forefront. Digital technologies, which are discussed in the final chapter, provides an opportunity for collective rights management societies to streamline their activity by allowing for significant reductions in management costs and an improved accuracy in royalty distributions. Whilst such development facilitates the reduction of transaction costs, it will further ensure that there is more transparency within the collective management system and more accurate distribution of royalties – which will hopefully do away with the type of issues CLA has faced in the recent past.

In conclusion, all the above arguments can be summarised as follows: the concept of collecting societies is good, but the system can be made better as the present system gives rise to grey areas and drawbacks generally, as was illustrated in the foregoing pages.

⁷⁶ *Ibid*, at p. 3.

SOLUTIONS FOR THE DIGITAL ERA:

RECOMMENDATIONS FOR ACADEMIC

AUTHORS AND

COLLECTING SOCIETIES

CHAPTER 7

SOLUTIONS FOR THE DIGITAL ERA:

RECOMMENDATIONS FOR ACADEMIC AUTHORS

AND COLLECTING SOCIETIES

Introduction

Although, the first-ever copyright Act, the Statute of Anne 1709, was brought into existence primarily to protect authors, as far as collective licensing was concerned, it was music piracy which led to the creation of the first-ever copyright collecting society by the Frenchman, Ernest Bourget in 1850. A similar trend has continued in the rest of the world, with music taking precedence over literary works in the field of collective management – but ultimately with literary works following suit. A possible reason for this trend can be drawn from the fact that a large number of technological advancements were created to disseminate music, hence leading to piracy, before technological advancements in the literary field. Thomas Edison's phonograph in 1887 kick-started the process as it opened up doors to 'reproducing' music over and above recording, which was anyhow being carried out at that time with inventions such as the music box¹. Thereafter, 'sound reproduction' was carried out by inventions such as the gramophone, juke box, tape recorder, lithographic recording (the Photographic Recording of sound such as motion pictures and television), radio, stereo records, magnetic recording tape and video. More recently personal stereo systems such as the walkman, disc-man and iPod have all facilitated the progress of sound reproduction. But in the literary field, there have not been as many technological advancements leading to literary reproduction. For example, the greatest impact in the literary field came about with the advent of the printing machine in 1436 and five-hundred years later, the photocopying machine in 1937, both of which led to a flurry of piracy in the literary field aided by other technological developments such as the telegraph, facsimile and scanner. However, the clear differences which existed in the two fields became almost non-existent with the invention of the computer and the Internet, which has posed a huge threat to all areas of intellectual property.

¹ The music box was invented in Geneva in 1876 by the watchmaker A. Favre. For a short history of the Pursuit and Capture of Musical sound, see, <http://inventors.about.com/gi/dynamic/offsite.htm?site=http://wwwknowmadz.org/library/ref/soundca.htm> (last accessed, 8 August 2006).

Up until the launch of the Internet, the reproduction of books, articles and journals was facilitated by the printing press. The Internet made digital reproduction easily accessible and convenient and with this possibility came piracy in the literary field as never seen before. For example, e-books² revolutionised the literary world with the digital or electronic book. The term digital or electronic book is used to refer to an individual work in a digital format, or a hardware device used to read books in digital format. However, e-books 'did not make much of an impact as the experience of reading on-screen has failed to live up to expectations'³. Although millions of people have become comfortable downloading and enjoying digital media, including e-books, 'until now, there has not been a good device on which to read'⁴. In addressing this problem Sony has launched a handheld device designed for electronic books – dubbed the Sony Reader. The screen is made from electronic paper which makes text look almost as sharp as it is on a printed page. Sony believes that the gadget will encourage more people to download and read books in digital, rather than paper format. This latest gadget went on sale in USA in May 2006 and is expected to do what Apple did for downloadable digital music, with the introduction of the iPod. Sony is not the only company to consider such technology. For example, the web giant, Google, has been electronically scanning thousands of volumes of books and has put some online with the intention of creating an index to all the world's books⁵. Undoubtedly, though, their plans have run in to opposition from publishers and authors. Furthermore, Google also intends to follow in the footsteps of Sony Reader. Asked if Google would consider doing something similar, Google CEO Eric Schmidt said: 'subject to permission from the copyright holder, yes. I want to be clear on that'⁶.

Technological developments such as the Sony Reader, Google Scholar and Sony's competitor, iRex, with their device Illiad, illustrate that the digital era has transformed the literary world completely and has widened the scope for authors to reach out to the public. In the context of this thesis, the question is what effect has the digital era had on HEIs and academic authors. It has already been established that academic authors are generally not

² <http://www.ebooks.com> is an authorised website which allows the downloading of books in return for a payment (last accessed, 8 August 2006).

³ Hermida A., Sony reader targets book lovers, BBC News (06 January 2006) at <http://news.bbc.co.uk/1/hi/technology/4586800.stm> (last accessed, 8 August 2006).

⁴ *Ibid.*

⁵ Hermida A., Google mulls online book future, BBC News (10 January 2006) at <http://news.bbc.co.uk/1/hi/technology/4586800.stm> (last accessed, 8 August 2006).

⁶ *Ibid.*

paid for their contributions to journal titles by collecting societies such as the CLA. An issue at the forefront of the analogue or print system is that even though copyright collecting societies are economically efficient and reduce transaction costs as established in chapters five and six, their importance as far as authors are concerned, in particular academic authors can be questioned. Copyright collective management in the UK clearly appears to favour the publisher members over and above the author and artists. Therefore this part of the chapter delves into a consideration of the solutions for authors in the digital era away from the confines of copyright collective management.

As far as the publishing industry is concerned, it became clear to them that publishing in HE and academic fields was not restricted to university presses anymore, but was open to commercial firms which more than willingly extended their businesses into up-and-coming HE and academic publishing. The increase in the number of universities during the 1960s led to the boom in academic publishing and hence investment in research libraries, which in turn opened the doors to increased journal publications, alongside book publications. However, the success of HE and academic publishers was largely attributed to research carried out by university staff, i.e. academic authors. As such, one of the criticisms directed at publishers has been the manner in which they make handsome profits in the process of making HEIs buy back the research which academic authors have produced. The publishers then charge licence fees through the mechanism of collecting societies for the use of those publications within HEIs.

Accordingly, this chapter will commence with an insight into the publishing industry, with particular emphasis on HE and academic publishing. The purpose of observing publishing in the HE and academic fields is to demonstrate the manner in which commercial publishers migrated into these fields during the 1960s, following the 'university boom' brought about by the recommendations of the Robbins Committee 1963. Therefore, the question which this chapter aims to answer, is whether a new model can be created with HEIs in mind or whether an existing model can be packaged to fit HEIs. As such, the chapter focuses on how the system of collective management can be improved from the author's point of view. In the same context, this part of the chapter also looks at a better model for HEIs, which have to subscribe to a collecting society in order to have access to the repertoire of authors. The proposed model is based on an existing model but is adapted to suit the digital era and benefit from it, as described below. Having raised the issues thrown up by copyright collecting societies in their interaction with HEIs, in previous chapters, this chapter questions

whether such an interaction is necessary and if so provides suggestions and recommendations as to how the interaction can operate more smoothly.

The proposed solution illustrates that the concept of collective management is still paramount even in the digital age and therefore the basic concepts which go towards the creation of a collecting society can be drawn upon to create a better system. Therefore, the chapter sets out the ways in which collective management can be improved in the digital era.

An introduction to publishing in the HE and academic fields

The first chapter in this thesis made a number of references to the development of the printing press since its invention in the 15th century⁷. This is because, during the first few centuries of publishing, the distinction between printers and publishers was not clear-cut; many printers operated effectively as publisher-printers, selecting the material to print and using their own resources to print and distribute it. However, with time the roles of the printer and the publisher became differentiated, as publishers took on the role of selection and risk-taking, while printers operated essentially as manufacturers of printed texts⁸. In other words,

the key activity of the publisher lies in the acquisition, development and manipulation of content, and it is this content, suitably revised and transformed, which is one of the publisher's principal assets. The decision about how to make this content available – whether to publish it as a printed book at such-and-such a price or to make it available in some other form – is a decision about how best to exploit the publisher's asset in the marketplace in order to realise its value⁹.

Having briefly distinguished between the roles of the publishers and printers it is also important to distinguish between university presses and commercial publishing firms. University presses are committed to publishing scholarly works. For the most part the

⁷ Chapter 1, pp. 23-25.

⁸ For a general introduction to publishing, see, Copinger and Skone James and Charles C., (eds.) *Publishing Agreements: A Book of Precedents* 4th ed., (London, Edinburgh: Butterworths; 1993), Chapter 1, 'The Publishing Industry'.

⁹ Thompson J. B., *Books in the Digital Age: The Transformation of Academic and Higher Education Publishing in Britain and the United States* (Cambridge, UK: Polity Press Ltd; 2005) p. 314.

university presses are registered as charities or not-for-profits¹⁰, and hence are not liable (in all or nearly all of their territories of operation) to pay corporation tax. In some cases these presses are constituted as departments within the universities and report to a particular officer. All university presses have one or more committees – such as the Press Committee of the Edinburgh University Press¹¹ – in which members of the host university oversee the activities, both editorial and financial, of the press. The prestige attached to a University will undoubtedly have a massive impact on its university press. A quote by one university press director in the US makes this clear –

The cachet of the university name is a very big factor in the pecking order, in the hierarchy of publishing. This doesn't mean that every elite university has a top-notch press, but it does mean Harvard, Princeton, Yale, Chicago carry a certain cachet which the University of Mississippi or the University of North Carolina never will. So that flows into acquisitions activities, all sorts of things. And depending on where you sit, that's an obstacle to be over-come or to be celebrated¹².

Two of the most successful university presses in the UK are Oxford University Press and Cambridge University Press. Whilst university presses are key players in the field of scholarly publishing, the field has also been invaded by a number of commercial firms, which are active in the field of academic publishing. John Thompson who has carried out an in-depth study into the patterns of academic and HE publishing, distinguishes between the two types of publishers and also traces the rise of the commercial publisher, giving reasons for their interest in the academic field¹³. Thompson thus establishes that commercial publishers do not have any special remit to publish scholarly works as in the case of university presses, nor do they benefit from tax exemptions. Their activities in the field of academic publishing are subject to the commercial constraints upon the organisation and the financial objectives set by its management. In most cases these commercial firms are active in fields other than academic publishing – most commonly, the fields of HE publishing, journal publishing, reference publishing and, in some cases trade publishing and professional

¹⁰ As of August 2004, the Edinburgh University Press has a Charitable Status, charity number SC 035813.

¹¹ Edinburgh University Press http://www.eup.ed.ac.uk/content.aspx?code=ABOUT_US (last accessed, 8 August 2006).

¹² *Op. cit.*, Thompson J. B., n. 9 p. 91.

¹³ *Ibid.*, chapters 1 and 2.

publishing¹⁴. For example, the publisher Sweet & Maxwell is 'a leading provider of information and solutions to the legal and professional markets in the UK and Ireland' and its business spans across books, journals, periodicals, looseleaves, CD-ROMS and online services amongst those in HE and also business professionals¹⁵. Other commercial academic or HE publishers are wholly or partly owned subsidiaries of larger corporations – for example, Penguin and Longman are among the numerous wholly owned subsidiaries of Pearson; and the Macmillan Group, which includes the academic print now known as Palgrave Macmillan, is owned by the German-based publishing conglomerate Georg von Holtzbrinck, which acquired a 70% stake in the Macmillan Group and now controls the whole company¹⁶.

As commercial firms, the academic publishers play the role of principal suppliers and risk-takers and aim to fulfil this role in the 'scholarly monograph' supply chain. Research libraries together with scholars and researchers make up their principal market.

A scholarly monograph is a work of scholarship on a particular topic or theme, which is written by a scholar (or scholars) and intended for use primarily by other scholars ... pitched at a relatively high level of intellectual sophistication ... it assumes that the reader is knowledgeable about the subject matter and has a professional interest in it. It is not a book written for the general reader with no background in the field¹⁷.

The library wholesalers (or 'jobbers' as they are called) play a particularly important role in the scholarly monograph supply chain. Research libraries are a key market for scholarly monographs, but for the most part libraries purchase books from booksellers and library jobbers rather than directly from the publishers. If this is the case, it can be questioned how academic publishers are so powerful?

¹⁴ See also, *ibid.*, p. 87.

¹⁵ Sweet & Maxwell at <http://www.sweetandmaxwell.co.uk/index.html> (last accessed, 8 August 2006).

¹⁶ *Op. cit.*, Thompson J. B., n. 9 pp. 91-92.

¹⁷ *Ibid.*, pp. 84-85.

Repetition of history: power to the (academic) publisher?

With the increase in universities and therefore research libraries, brought about by the recommendations of the Robbins Committee 1963, the late 1950s and 1960s saw a boom in academic publishing and the market for scholarly monographs became increasingly strong in the 1970s. In 1955, Oxford University Press was the second largest publisher with the most number of scholarly titles¹⁸. Rather than risk-taking, the principal task of many academic publishers at that time was one of selection: to decide which of the scholarly projects was of sufficiently high quality to merit publication. Once the decision to publish had been taken, factors such as the increase in universities and libraries contributed to positive financial aspects. 'The publishers of the 1970s had the confidence that the print-runs could be set high enough to make most monographs financially viable'¹⁹. However, the 1980s began to unravel a different story. It became clear to many in the world of academic publishing that the market for scholarly monographs was going through a period of change²⁰. There was a decline in the sales of scholarly monographs, which forced many academic publishers to re-examine their practices leading to fundamental transformation in terms of strategies, orientations and organisational cultures of academic publishing firms. The unit sales of scholarly monographs fell to a quarter or less of what they were in the 1970s and what was once a straightforward and profitable type of publishing had become much more difficult in financial terms²¹.

Thompson goes on to give a number of reasons to explain the decline in the sales of the scholarly monograph²². One such is the financial pressure faced by the research libraries at the major universities. The growth of academic publishing in the 1960s and 1970s was fuelled by the expansion of universities in the UK. The massive expansion of HE, particularly during the 1960s, led to greater investment in university libraries – both in the building of new libraries and in the provision of increased resources for existing libraries. As budgets grew for acquiring books the demand for books, periodicals and content in other forms (such as microfilm) increased, and academic publishers began to taste success as never before. But from the early 1970s on, the growth in demand began to fall and many

¹⁸ Political & Economic Planning (PEP), *Publishing and Bookselling*, vol. xxii No. 392, 6 February 1956 (London: Political & Economic Planning; 1956).

¹⁹ *Op. cit.*, Thompson J. B., n. 9 p. 271.

²⁰ *Ibid.*, pp. 93-94.

²¹ *Ibid.*, p.94.

²² *Ibid.*, pp. 98-99.

universities dependent on public funding found that their budgets were being squeezed, and university administrators looked for ways to cut costs. Since the early 1980s, two additional factors have played an increasingly important role in reducing the budgets for new book acquisitions by university libraries: the growing proportion of acquisitions budgets which is spent on periodicals, and the growing expenditure by libraries on IT services and on the acquisition of content in electronic formats²³.

For example, Thompson notes that the expenditure on periodicals in UK universities increased by 28% over this period and expenditure on electronic materials increased sixfold. Expenditure on books also increased during this period but by a much smaller extent: 9.5% overall. During the same period the average price of new UK academic and professional titles rose from £35.35 to £44.18 an increase of 25%²⁴. So while overall expenditure on books in UK institutions of HE was increasing over this period, the increase was well below the rate at which the price of new journal titles was increasing. Waters who has also carried out a survey on budgets for new book acquisitions notes that librarians at universities in the UK have confirmed that the budgets have been squeezed over the years by the steep rise in serial prices and the increasing levels of expenditure on IT and electronic products²⁵. This is more apparent in smaller institutions where as in larger ones librarians have managed to keep books from eroding in numbers²⁶.

Analysis: Publishers v. Academic Authors

The above-mentioned factors are particularly relevant further to establish the main arguments of the thesis. At this juncture it must once again be re-iterated that the question of fair remuneration for academic authors arises mainly as a result of their academic contributions to journal and periodical titles. Therefore, the rise in the number and costs of journals place further emphasis on the question of fair remuneration for authors. If authors are creating the works for publication and academic publishers are making a significant amount of money from the authors' creative works, is it not reasonable for the author to expect a share of the remuneration? Such questions have given rise to much debate in recent years and have become a matter of serious concern within the scholarly community.

²³ *Ibid.*, p. 99.

²⁴ *Ibid.*, p. 105.

²⁵ Waters D., *Developing Digital Libraries: Four Principles for Higher Education* (2001) *Educause Review* (September/October), pp. 58-59.

²⁶ *Op. cit.*, Thompson J. B., n. 9 p. 105.

There are many in higher education who have been sharply critical of the current system of scholarly communication: university staff are paid, often by the public purse, to undertake research and make the results available, and the intellectual content is then being handed over to journals publishers who are charging university libraries substantial sums to buy the content back, generating a handsome profit in the process²⁷.

Publishers respond to criticisms of their pricing policies by emphasising that they add considerable value in the publication process, that the size of many journals has increased in recent years, and that the costs associated with the development and constant upgrading of electronic delivery systems are high.

However, the Select Committee of Science and Technology in the House of Commons²⁸ takes a contrary view, in a Report published in 2004 and has been in debate about the position of academic authors and licence fee due to them in the print environment. In examining the reasons for the steep rise in the costs of journal and periodical titles, the Select Committee unanimously agreed that public money is being used at three stages in favour of publishers²⁹. As such, one of the main issues in the print environment was that publishers, in a repetition of history, have much more power than the authors, and as a consequence they benefit along the publishing chain and, once again, in the licence fee chain through copyright collective management societies such as the Copyright Licensing Agency (CLA). Whilst publishers enjoy a payment from the public funds in the print environment in the publishing process as identified by the Select Committee, i.e.,³⁰ –

- (1) funding the project;
- (2) funding libraries to purchase publications;
- (3) pay salaries of academics who carry out peer review, which is the process of ensuring that publications are up to the appropriate standard, prior to publication for no extra payment; and

²⁷ *Ibid.*, pp. 101-102.

²⁸ House of Commons, Select Committee on Science and Technology, Tenth Report, Chapter 4, (Session 2003-04), 20 July 2004, '*The Cost of Journal Provision*' at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/39902.htm> (last accessed, 8 August 2006).

²⁹ *Ibid.*

³⁰ *Ibid.*

it is the writer's present opinion that there is a further fourth factor as well to this advantage –

- (4) Licence fees collected from institutions such as HEIs, in to which the public money has already flowed, to remunerate mainly publishers once again for the reproduction of copyright works within these institutions.

It can be seen that the public money is being used to fund the same purchase up to four times. Therefore it is of little wonder that with the decline in scholarly monograph sales throughout the 1980s and 1990s, and the take-off of journal and periodical titles, many academic publishers began to reduce their output of scholarly monographs and sought to migrate into the field of HE journal publishing. As more publishers migrated into the field of HE journal publishing and as the large trans-national corporations increased their presence in the UK, the relative openness of the field of HE publishing in the UK began to change. The field became more competitive as more and more players entered it to be part of a lucrative business³¹.

This raises the question why, if publishers are assisted so much along the way to publishing the creative works of authors, authors are weighed down with restrictions in the creation process (where it is carried out in the course of employment) and as such receive funds whether for the 'process of creation' nor for publication, not to mention remuneration through copyright collecting societies. Also, it cannot be ignored that the area in which publishers add the greatest value to the publishing process is peer review – carried out by academics for no extra payment³². Given the lack of author payment the principal costs of peer review are associated with its administration and with the establishment of a network of contacts to supply the necessary experts. Blackwell Publishing stated that peer review cost an estimated £264 per accepted article with the amount rising to £372 if editorial honoraria were taken into consideration³³.

In this context, the Select Committee opined –

Publishers should acknowledge the contribution of unpaid peer reviewers to the publishing process. We recommend that they provide modest financial rewards to

³¹ *Op. cit.*, Thompson J. B., n. 9 p. 273.

³² *Op. cit.*, House of Commons, Select Committee on Science and Technology, n. 28 para. 73.

³³ *Ibid.*, para. 74.

the departments in which the reviewers are based. These rewards could be fed back into the system, helping to fund seminars or further research³⁴.

Concerns from the HE sector and dissatisfaction among academics have stimulated the development of alternative methods for the dissemination of scholarly output. Amongst others, these include the development of electronic pre-print open-access servers, which allow authors to archive their articles before they are published, as discussed below.

Solutions for academics in the digital era: the Open-Access Journals or Author-Pays system

At the outset it must be pointed out that the statistics and surveys referred to in the following discussion are taken from a survey titled, 'Towards Good Practices of Copyright in Open-Access Journals – A Study among Authors of Articles in Open Access Journals'³⁵ (hereinafter Open-Access Study or The Study). The present writer was also a participant in the survey.

The open-access initiative, which is a form of electronic publishing,³⁶ promotes (1) free online access; and (2) permission to use open-access information for any responsible purpose. Three conferences in Budapest (12 February 2002), Bethesda, U.S.A. (11 April 2003) and Berlin (20-22 October 2003)³⁷ are seen as the trigger for bringing the open-access initiative in to the limelight, with a statement endorsing its importance followed by the creation of the Directory of Open-Access Journals³⁸. These conferences identified two conditions, which must be satisfied to qualify for open-access publication. They were –

³⁴ *Ibid.*, para. 71.

³⁵ Compiled by Hoom E. & Van der Graaf M., (5 August 2005) at <http://www.surf.nl/en/publicaties/index2.php?oid=50> (last accessed, 8 August 2006).

³⁶ The term 'electronic publishing' is a broad term, which comprises at least three different forms of computer-based media: diskette, CD-Rom and the Internet.

³⁷ A link to all three conferences (Budapest, Bethesda and Berlin) can be found at <http://www.zim.mpg.de/openaccess-berlin/links.html> (last accessed, 8 August 2006). However, since the late 1980's there have been free on-line journals. For example, in 1989, one of the first free on-line journals was launched by Stevan Harnad titled '*Psychology*' which is in existence even today. This journal was first peer-reviewed on 28 January 1990 and follows the trend since then and is sponsored by the American Psychological Association.

³⁸ Directory of open-access journals at <http://www.doaj.org/> (last accessed, 8 August 2006). This project was launched by Lund University with funding from the Open University Institute and SPARC. The project was officially launched on 12 May 2003.

- (1) The author(s) and right holder(s) of such contributions grant(s) to all users a free, irrevocable, worldwide right of access to, and a licence to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use.
- (2) A complete version of the work and all supplemental materials, including a copy of the permission as stated above, in an appropriate standard electronic form is deposited (and thus published) in at least one online repository using suitable technical standards (such as the open-archive definitions) that is supported and maintained by an academic institution, scholarly society, government agency, or other well-established organisation that seeks to enable open access, unrestricted distribution, inter operability, and long-term archiving.

Under this system of the open-access or author-pays system, the author, rather than the reader or subscriber, meets the costs of publishing. Articles under the author-pays system undergo the same peer review process as is employed in the current print system. Once published, they are available online, free of charge, to anyone. The significance of this system is two-fold –

- (1) Firstly, as already pointed out, the author does not meet the costs of publication personally: this is a common misconception. In practice, the research funder or the research institution would pay the fee. As such the author-pays publishing moves the costs of publication rather than removing them from the system entirely. The essence of this system is captured well by the Select Committee on Science and Technology –

People imagine that the situation is that we suddenly ask authors to take some money from their petty cash, or away from their children and give it to some publisher who is going to publish them. That is not all the situation [. . .]. Just as, most commonly, scientists do not have to subscribe, so most commonly scientists do not have to pay personally³⁹.

³⁹ House of Commons, Select Committee on Science and Technology, Tenth Report, Chapter 4 (Session 2003-04) 20 July 2004 '*Should the Author Pay?*' at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/39910.htm> (last accessed, 8 August 2006).

- (2) The second important factor about the author-pays system is which road should be chosen to journey towards publication – the green or golden roads as identified in the open-access study?

The green and golden roads to open-access publishing

The 'green road' referred to in The Study applies to the subscription-model journal publishers that allow some form of the article to be archived in institutional repositories and to be made accessible either directly after publication or with a waiting period of six to twelve months⁴⁰. This trend of self-archiving is a characteristic of the 'green road' and shot to fame through the introduction of Google Scholar⁴¹. This recently introduced Google search engine specialises in scholarly information and has shown that questions of accessibility and irretrievability of the institutional repositories can potentially be solved in partnership with commercial search engines alongside more specialised services⁴². Furthermore, recently, the National Institute of Health (USA) implemented a policy encouraging published results of research funded by it to be made available at least twelve months after the original publication via open access. The Wellcome Trust (UK) already has a policy that mandates open-access within a six-month period⁴³. The Research Councils in UK (RCUK) are also developing a position that favours the deposit of research they fund in either institutional or subject repositories⁴⁴. This shows that there is a trend towards open-access and self-archiving.

However, two interviewees of The Study expressed concern stating that –

It could mean that scientists choose to keep on publishing in the traditional journals with the subscription model and also archive the articles in the institutional repositories to achieve universal access. Such a development would mean that an

⁴⁰ *Op. cit.*, Hoorn E. & Van der Graaf M., n. 35 at pp. 12-13.

⁴¹ <http://scholar.google.com/> (last accessed, 8 August 2006).

⁴² The British Academy, *E-resources for research in the humanities and social sciences: A British Academy Policy Review* (London: The British Academy; 2005) Section 2.

⁴³ Wellcome Trust: *Wellcome Trust Position Statement in support of Open and Unrestricted Access to Published Works* (September 2005) at http://www.wellcome.ac.uk/print/wtd002766_print.html (last accessed, 8 August 2006).

⁴⁴ Research Council UK, News Release, *More money boosts young researchers but work ahead says new report* (1 August 2006) at <http://www.rcuk.ac.uk/press/20060801enhanced.asp> (last accessed 5 August 2006); *Research Council UK publishes update of position statement on access to research outputs* (28 June 2006) at <http://www.rcuk.ac.uk/press/20060628openaccess.asp> (last accessed 5 August 2006); *Research Council UK moves forward with position on access to research outputs* (21 September 2005) at <http://www.rcuk.ac.uk/press/20050921rcuk.asp> (last accessed 5 August 2006).

important driving force to publish in open-access journals finds another way of expressing itself⁴⁵.

However, even if the green road towards open-access is burdened with some obstacles, the golden road towards open-access appears to be more promising. For example, there are approximately 2359 open-access journals included in the Directory of Open Access Journals⁴⁶. The number of open-access journals presently increases at the rate of approximately 50 journals per month. Over and above this impressive figure, a number of subscription model journals have made the transition to open-access (only or by choice of the author). A couple of examples include the British Medical Journal (hereinafter BMJ) and the Nucleic Acid Review, which signals a healthy change to open-access journals⁴⁷. It is also encouraging to note that large commercial publishers Springer and Blackwell have started programmes whereby authors get the choice to have their articles published under the open-access system.

Whilst the golden road sounds more promising than the green road, the focus remains on the academic author and how these different paths can affect him or her. For example, The Study raised a few questions in this regard: are academic researchers aware of the journal crisis and the open access movement? And if so, are academic researchers willing to change their publication behaviour? Are academic researchers willing to change the practice of transfer of copyright to the publishers? Are academic researchers willing to spend time and effort in self-archiving? These questions will be answered by looking into the different types of open-access licences available to academics and the benefits, which can be gained from them. However, before moving on to that discussion, it is important to point out the following: that the difficulty in change from subscription model to open-access lies with the fact that although open-access has the potential to reach a much wider audience, academics may still prefer the prestige attached to the traditional subscription-model journals. The solution to this issue will be for traditional journals, which have already earned a prestigious name in the print environment, to adopt the open-access system as well, similar to the BMJ and Nucleic Acid Review. A discussion of the various licences involved will make the present point clearer.

⁴⁵ *Op. cit.*, Hoorn E. & Van der Graaf M., n. 35 p. 13.

⁴⁶ Information taken from Directory of Open Access Journals (DOAJ) at <http://www.doaj.org/> (last accessed, 10 August 2006).

⁴⁷ *Op. cit.*, Hoorn E. & Van der Graff M., n. 35 p. 13.

Open-access and licences dealing with the transfer of copyright

There are four types of licences available to academic authors wishing to publish in open-access journals as identified by Hoorn and Van der Graff in *The Study*⁴⁸. They are –

- (1) The ‘attribution’ licence which is a follow-on from the Creative Commons licence;
- (2) A licence where commercial use is limited;
- (3) A licence where authors are offered the choice of publication in subscription model journals or open-access journals; and
- (4) A licence where the author can retain all rights.

Each of these licences will be considered in turn.

Model A: The Attribution licence: ‘all usage allowed including reuse for commercial purposes’

The ‘attribution licence’ is a shoot-off of the Creative Commons, which was founded in 2001, by Lawrence Lessig, being in part inspired by the open-source movement⁴⁹. The most significant change brought about by the Creative Commons has been the change of the copyright slogan from ‘all rights reserved’ into the slogan ‘some rights reserved’. Creative Commons has created various types of licences whereby the creator can protect his or her works while encouraging certain defined uses.

As such, the attribution licence, where ‘all usage is allowed’⁵⁰, in accordance with the Creative Commons licence, is considered to be the ‘most suitable licence for research articles’. It permits the author to retain the copyright but licences the publisher to distribute his or her article on a non-exclusive basis. The reader/user is not restricted in reusing the article, except with regard to attribution: he is obliged to mention the full source (author and full bibliographic details). The reason why the present writer refers to this licence as a licence where ‘all usage is allowed’ is because the author only has the right to his moral rights and the right to be cited through a proper citation. In an interview with the publisher of Biomed Central, documented in the referred *Study*⁵¹, the following view was given –

In [my] view the Open Access model is only relevant for research articles (so: not for review articles, editorials, news ... textbooks etc.). In this view, it is in the interest of the researcher to have the results of research published: if the results are

⁴⁸ *Ibid.*

⁴⁹ <http://www.creativecommons.org> (last accessed 8 August 2006).

⁵⁰ *Op. cit.*, Hoorn E. & Van der Graaf M., n. 35 p. 20.

⁵¹ *Ibid.*

not published, it is as if the research had not taken place at all. In this view, only the moral rights, the right to be cited through a proper citation, are important for the researcher while the exploitation rights are not important and can only hamper scientific communication about the research results. Thus, [this] licence is the most suitable licence for research articles⁵².

This can be a moot point and is clearly arguable, based on the fact that whilst research is useless unless and until published, the concept of 'free riding' in the copyright world is loathed. The pharmaceutical industry is often depicted as a potential 'free rider' in the scholarly communication system. However the counter-argument to this is that recent figures indicate that industrial companies, such as for example in the pharmaceutical industry, already commission and so pay for, an important percentage of academic research. The pros and cons of this licence can be summed in the following way: whilst legitimate scholarly uses are all possible for everyone, the author maximises the impact of their research article. The drawbacks can be that industries may reuse articles without any fee thereby acting as 'free riders' on the academic community.

Model B: Commercial use limited licence – 'all usage is allowed except for commercial purposes'

Under the terms of this licence the author can retain the copyright but must transfer all commercial exploitation rights to the publisher. For example, the BMJ and Nucleic Acids Review are two of the traditional journals to change their copyright policy to embrace 'Model B' of the open-access system. From 2000 onwards BMJ has left the copyright with the author and they only require an exclusive licence to publish the article first and to claim all commercial exploitation rights. In addition, a plus of this licence is that publishers which employ it, such as the BMJ Publishing Group, give the author a percentage of the royalties if they enter into a commercial republishing or distribution deal on the basis of the author's article. The advantage for the author is that he or she can do whatever he or she wants with the article without asking permission from the BMJ Publishing Group as long as it does not involve commercial rights. This is a massive improvement from the print environment for research and academic authors. The other advantage of course concerns the potential revenue for the authors from royalties. As such, this is a balanced licence, which proves beneficial for both the author and the publisher.

In support of this licence, the publisher of the Nucleic Acids Review stated –

⁵² *Ibid.*

I agree with many of those views – it is morally desirable that authors should retain their copyright and that readers of those papers be allowed to re-use the content for educational and research purposes. But there are other scenarios where scientific research is used to defend a profitable commercial company's business interest ... By requiring anyone who wishes to re-use any aspect of a paper for commercial purposes to seek permission and pay a fee to do so, we achieve several things. We ensure that the published content is not misused in any way that would serve a commercial company's business ends at the expense of the integrity of both the researcher and journal⁵³.

In summing up the limited commercial use licence it is clear that a potential advantage of this licence is the additional revenue stream from commercial exploitation, from which the author can benefit. As such, whilst the research funder or institution meets the costs of the author for publication, the author also has the advantage of being remunerated. Potential disadvantages of this model are that a number of legitimate scholarly uses (for educational purposes) may fall under the definition of commercial purposes. This is because there is a serious demarcation problem with defining legitimate scholarly use on the one hand and defining commercial purposes on the other, as universities and academic institutions increasingly engage in commercial educational activities. The problems related to identifying what is commercial and non-commercial in the academic world were already discussed in Chapter 2. In the present context it can be said that from a legal point of view it is the nature of activities, which counts rather than the nature of the organisation. In this sense where academic authors publish with no direct economic remuneration in mind, licence models A, C, and D will be applicable. However, if the journal article has a commercial purpose, then model B will be the most relevant. Also a function of monitoring and enforcing copyright infringement will be necessary.

Model C: Licence with a restriction on reuse for commercial purposes – 'all usage allowed'

The rights to republish and/or transform (parts of) the articles are granted only if the resulting works are redistributed under an open-access licence as well. Examples of this approach are the journals of the European Geosciences Union (EGU) – published by Copernicus⁵⁴, a German publisher of a number of open-access journals. The print versions of these journals are subscription-based: logically, commercial reuse of the article is

⁵³ *Ibid.*, p. 22.

⁵⁴ <http://www.copernicus.com> (last accessed, 8 August 2006).

restricted. Copernicus states that they require the commercial rights in order to produce hardcopy volumes of the journal for sale to libraries and individuals.

This licence will be important for authors who consciously choose an open-access journal for their article. The limitation on republishing is that it can be done only under an open-access licence, which might lower the potential impact of the article.

Model D: Licence which permits the author to keep commercial exploitation rights – ‘all rights reserved’ (by the author)

According to this licence, the commercial exploitation rights stay with the author which means that it allows authors to retain their copyright and restricts reuse of their work for commercial purposes. One of the more popular journals in the field of law, which adopts this system, is the Electronic Journal of Comparative Law (EJCL), which was started in 1995⁵⁵. The copyright policy of this journal is simple:

- (1) the author keeps the copyright;
- (2) the journal asks only for a licence to publish the article as the first publisher of it; and
- (3) the author is obliged to mention the EJCL as a source whenever he or she later republishes the article on other platforms.

The copyright licence of the journal is clear: classroom use is free but other uses depend on the permission of the author themselves. In replying to the question whether there are many requests for commercial reuse, the editor-in-chief who was interviewed for The Study stated that the journal had no information on this point. The requests for re-use goes directly to the author, and therefore there is no centrally held data about the number of requests made⁵⁶.

Another example of a journal, which uses this licence, is Script-ed, A Journal of Law & Technology published by the AHRC Research Centre for Studies in Intellectual Property and IT Law at the University of Edinburgh⁵⁷. According to Script-ed Open Licence (SOL), the author retains the commercial exploitation rights whilst other rights are given to the users under a specially written licence. Clause 2 of SOL states –

⁵⁵ See <http://www.ejcl.org> An article of the author was published in this journal in 2003 and can be found at <http://www.ejcl.org/75/art75-8.html> (last accessed, 10 August 2006).

⁵⁶ *Op. cit.*, Hoorn E. & Van der Graaf M., n. 35 p. 21.

⁵⁷ <http://www.law.ed.ac.uk/ahrb/script-ed/index.asp> (last accessed, on 10 August 2006).

The Author hereby grants the User the rights to copy, issue copies of the Work to the public, translate, display, perform and broadcast the Work for strictly non Commercial Use; unless in doing so the User infringes any of the conditions included in the Licence.

This type of licence clearly cuts out the middle man altogether, and the licence is directly between the author and user. It is hence cost-effective and makes use of digital technology in the most efficient manner. The journal itself is not involved and therefore has little or no workload relating to copyright issues. The disadvantages of this type of licence is that the function of monitoring and enforcing copyright under this model is placed with authors, who are generally not very well equipped to carry out this function. Secondly, the transactional costs will be high if someone wants to reuse a significant number of articles for commercial purposes: individual authors will be difficult to locate and might have no experience and/or business-like approach with permission requests⁵⁸.

The success of each of these licences is illustrated through the following chart adapted from The Study by Hoorn and Van der Graff. The percentages refer to those participants of The Study who thought the model was a success, a failure or remained neutral about it.

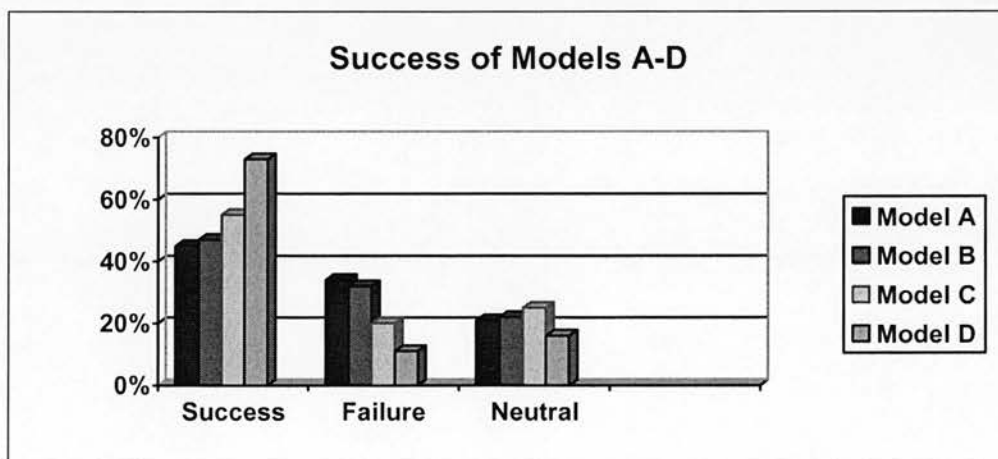


Figure 6 – Model taken from survey carried out by Hoorn E. & Van der Graaf M

⁵⁸ *Op. cit.*, Hoorn E. & Van der Graff M., n. 35 p. 36.

Analysis: the pros and cons of the author-pays system and the different licences

Author-pays publishing has been instigated because the current publishing model limits and inhibits access to scientific publishing. By making journal articles free at the point of use, author-pays publishers hope to solve this problem.

One of the benefits of the author-pays system is the fact that publication costs will be paid out by the research funding. To elaborate on this point, it must be pointed out that in order to give researchers a free choice of the journal in which they publish, funding to pay those fees will need to be formally identified. Such funding normally originates with the research funder and not the institution which runs the journal. By making publication cost a proportion of total research costs, this would facilitate effective planning and budgeting. Furthermore, it has been argued that the author-pays model is more sustainable than the traditional subscriber-pays model in the long term: 'by treating the costs of publication as costs of research and including funds in research grants, monies available for publication will scale with publication expenses'⁵⁹. Recognising this system as economically efficient the Wellcome Trust maintains that the author-pays publishing model costs less than the current model overall, and as such author-pays model creates greater economies of scale. As explained in chapter five, economies of scale spread total costs over a greater range of output. However, the producer has to sell a large quantity of the product, to recover not only the 'marginal costs' of production but also the 'fixed costs'. Accordingly, even in the author-pays system, a drawback is that author-pays publishers would need sales forces in the market to negotiate with research funders to pay fees on behalf of researchers, to ensure that the overall costs of author-pays system is met.

The Government has recognised the need for funds to be made available for authors who choose to publish in an author-pays journal. However, at present, only 5% of all publishing takes place using the author-pays model. The funding needed to facilitate this activity at present is, therefore, limited. Were the practice to become more widespread, the amount of funding needed would increase. Such increase would, however, be balanced by savings in the library budget.

⁵⁹ *Op. cit.*, House of Commons, Select Committee on Science and Technology, n. 39 para. 144.

Publication costs paid by public funding bodies would not cover the costs of all potential authors. Not all funding sources are acknowledged, making it difficult for the funding bodies to pay for publication. According to the Government's statistics, 35% of published articles currently have no financial acknowledgements, 'either explicit or implicit from their corporate addresses'. Also whilst sciences may receive large research grants, research grants in the humanities are generally small.

The best defence against a bias towards well-funded disciplines is for the funding agencies and research institutions that will primarily fund open access publishing to allocate sufficient funds to all disciplines to cover their publication costs.

Peer review in an author-pays system

The success of the journal is a key factor in understanding the impact of author-pays publishing on peer-review. Academics seek to publish in journals that have high impact factors and are well regarded in their field. Therefore in order to succeed, most author-pays publishers, like everyone else, will have to publish articles of a high quality. It is not, therefore, within the interest of journals at the higher end of the market to lessen the rigour of peer review. Nonetheless, there is a risk that lower quality journals might seek to reduce their quality threshold in order to generate profit. Were the author-pays publishing model to prevail, it would be vital to ensure that peer review was not compromised in order to retain confidence in the integrity of the publishing process. In this context, a further concern in open-access publishing is the possibility of 'vanity publishing', which is poor quality research being published for a fee and a flood of non-peer reviewed papers appearing on the Internet.

Therefore, it has been argued that author-pays publishing model could compromise the integrity of peer review. In this regard the Publishers Association said: 'once financial or any other type of patronage is introduced, independence and objectivity [are] compromised'. Harold Varmus of the Public Library of Science (PloS) dismissed this argument as –

Rubbish [...] We have reviewers who make the determinations about what we are going to accept, who have no direct interest in the fate of our journal, but the most important thing is that we, as publishers of open access journals, want our journals to be high quality. It is the only way we are going to succeed⁶⁰.

Peer review is carried out by academics who are unpaid and whose reputation is influenced by their participation in the peer review process. In both the subscriber-pays and the author-pays models, the process of reviewing articles for publication is, and needs to remain, independent of the mechanisms used by publishers to recover costs.

Free riders

The Biochemical Society said that –

In the open-access world it would appear that the only real winners are going to be corporate pharmaceutical companies who would no longer have to pay for access information⁶¹.

As such, there is concern that author-pays publishing would allow companies to become free-riders in the publishing process. The Public Library of Science (PloS) said the commercial sector

pay their taxes, the taxes go to government, the government agencies pay for publication and want the industries to see the results of research because one of the reasons we do medical research is to support industrial efforts in making new products which help to improve the health and nation⁶².

This is true: giving industry access to research findings can have significant benefits for the economy and would assist the transfer of knowledge between academia and industry. This in the present opinion is not a drawback. If the open-access system is working smoothly, then why is it that those who pay taxes for the betterment of research cannot have access to the research? In any case a significant proportion of publishing costs are currently paid for by industry. Even though they are disputed, publishing costs do not fall below a minimum

⁶⁰ *Op. cit.*, House of Commons, Select Committee on Science and Technology, n. 39 para. 169.

⁶¹ *Op. cit.*, House of Commons, Select Committee on Science and Technology, Tenth Report, Chapter 4 (Session 2003-04) 20 July 2004 'Should the Author Pay?' n. 39 para. 175.

⁶² *Ibid.*, para. 176.

level whatever the publishing model. If industrial subscriptions are taken out of the system, the publishing process will be substantially less well off.

Author fee: Is this a hurdle to open-access?

Learned societies, which are ‘societies that exists to promote an academic discipline or group of disciplines open their membership to all, although membership will depend on the possession of some qualification or an honour conferred by election, as is the case with the oldest learned societies such as the Royal Society of London (founded 1660)’⁶³. Such learned societies use income generated by their publishing activities to subsidise other society activities, such as conferences, maintaining professional standards and supporting education in schools. The author-pays model can jeopardise this. For example, the British Pharmacological Society stated that ‘in 2002-03 they spent over £850,000 on promoting and advancing pharmacology. Nearly £800,000 of this came from their [traditional] publishing activities’⁶⁴. Without this income they would either have to raise funds in a different way or cease to provide most of their current activities. Similarly the Biochemical Society reported that it generated between £500,000 and £750,000 from publishing. The concern is that the author-pays model would generate a reduced publishing surplus⁶⁵.

The transition to the author-pays model involves substantial one-off costs and continuing subsidies until the journal in question reaches the revenue-earning stage. With reference to The Study, the Institute of Physics Publishing (IoPP) told us that, since 1998, it has been subsidising its New Journal of Physics at a rate of £100,000 per annum. However, at \$560 per article they have not been charging authors full costs:

We have found authors reluctant to pay. Even if all authors paid, we would need a far higher page charge in order for the journal to cover its costs⁶⁶.

However, most interviewed authors in The Study did not see the author fee as a problem. For most of them, the author fee was waived: paid for by the institute, university or even by another arrangement. One of the respondents stated –

⁶³ Definition taken from http://en.wikipedia.org/wiki/Learned_society (last accessed 5 August 2006).

⁶⁴ *Op. cit.*, House of Commons, Select Committee on Science and Technology, Tenth Report, Chapter 4 (Session 2003-04) 20 July 2004 ‘Should the Author Pay?’ n. 39 para 178.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, para. 179.

I worked in an experimental laboratory and I published more than 35 papers there.

We had to pay all the time! That is much more expensive than open access⁶⁷.

Another said –

We often have to pay page charges for colour photographs etc. The amounts of money you have to pay are more or less the same as in open access journals⁶⁸.

The figures from The Study further make these points clear –

36%: no fee required;

19%: the publisher waived fee;

25%: fee paid out of research grant;

8%: fee paid out of departmental funds;

9%: fee paid out of other institutional funds;

4%: fee paid by the author himself; and

1%: fee paid out of other sources⁶⁹.

Therefore, only as few as 4% of authors paid the publication costs themselves/individually, whilst for 96% of authors, the costs were met by other means as listed above.

The significant difference between the traditional printing environment and the author-pays system is that whilst under the former system the author expects some form of remuneration, according to the latter system, the author is under no such ‘delusion’ and pays for the publication through research funds etc. as identified above. Michael Doherty and Patricia Leighton in their article ‘Research in Law: Who funds it and what is funded? A Preliminary Investigation’⁷⁰ make it clear that there are a considerable number of bodies potentially able to fund research in Law⁷¹. For example, the submissions to the UK Research Assessment Exercise 2001 referred to no fewer than fifty-five sources of funding for research in Law. However, on further investigation Doherty and Leighton establish that many funding bodies

⁶⁷ *Op. cit.*, Hoorn E. & Van der Graaf M., n. 35 p. 43.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ (2004) vol. 38, no. 2 *The International Journal of Legal Education*, pp. 182-201.

⁷¹ *Ibid.*, at p. 185.

were small and funded few projects in law. Others were highly specialised and made little overall contribution to research in law.

Also of considerable concern to them was the fact that many legal subjects of major practical importance appeared to have received no funding at all. We found no funded project on contract law, tort, trusts and a handful on property law. Company and commercial law received little funding⁷².

This means that the middle-man or the collecting society, is cut out and the author and publisher transact directly, as in the days before the printing machine was invented. Therefore, the author-pays system recognises the author more so than in the past and strikes the perfect balance between the author and user. The advent of the digital era posed a number of problems for the author in terms of piracy and plagiarism and attempts were made by both law and technology (encryption, digital locks) to meet these issues. Inevitably, authors had to adapt from the traditional printing environment to the electronic age. It appears that the time has come for the publishers to adapt – to one of the more successful solutions devised by those in the academic community: Higher Education Resources On-Demand (HERON).

An introduction to HERON: how and why it was created

The proposal, which is submitted in the present thesis as a solution for HEIs wanting to use copyright works in their institutions for teaching and research, and authors who wish to be remunerated for their academic contributions is modelled on the existing HERON Project⁷³. HERON is a one-stop-shop which provides for copyright clearance, digitisation and delivery of book extracts and journal articles enabling universities and colleges to provide access to key learning materials for all their students, wherever they are based. HERON is a designated Trusted Repository, which means that it can hold copies of CLA-cleared digitised texts to be stored until permission is given for re-use. It has also developed a resource bank of 2.5 million digitised materials for rapid re-use (subject to copyright permissions).

The roots of HERON go back to the Follett Report 1993.⁷⁴ The Follett Report was created to address 'the implications of recent growth in undergraduate student numbers for the library

⁷² *Ibid.*, p. 197.

⁷³ Details of the HERON Project can be found at <http://www.heron.ingenta.com> (last accessed, 8 August 2006).

⁷⁴ The Follett Report can be accessed at <http://www.ukoln.ac.uk/services/papers/follett/report/> (last accessed, 8 August 2006)

services on which so much of teaching and learning depends'. Other developments in the organisation and funding of HE, and developments in teaching and learning techniques, further reinforced the need for a review⁷⁵. Following the recommendations of the Follett Report, 1993 on the use of information technology (IT) in university libraries, the Joint Information Systems Committee (JISC) established the Electronic Libraries Programme (eLib)⁷⁶. The central aim of eLib was to use IT to improve delivery of information through increased use of electronic library services.

HERON was initiated as a phase three eLib project, and began work in August 1998. The project's original remit was to:

- Develop a national database and resource bank of electronic texts in order to widen access to course materials and improve the quality of learning throughout higher education in the UK;
- Collaborate with rights holders and representative bodies to remove blockages in copyright clearance and to determine appropriate fee levels and conditions for the digital age; and
- Offer opportunities to universities and colleges to market their own learning resources.

The HERON test service began in June 1999, with five universities actively participating and with three leading the way: namely the Universities of Stirling (lead site), University of Napier (Edinburgh) and South Bank University (London). By the end of July 2000, membership had increased to 17 universities, and by the start of the academic year 2001/02, HERON had over 40 members. By the end of the project phase in July 2002, HERON had over 50 subscribing institutions within the UK and had begun the extension of the service to the Further Education sector. In March 2002, HERON was acquired by Ingenta⁷⁷, ensuring its future after its project phase ended in July 2002. Ingenta is a leading provider of technology and services to the publishing and information industries. It was founded in 1998 and primarily worked within the confines of the academic and research sector before expanding to other forms of online publishing, especially in the financial and business

⁷⁵ Follett Report, Chapter 2: Introduction and Working Methods at <http://www.ukoln.ac.uk/services/papers/follett/report/ch2.html> (last accessed, 8 August 2006).

⁷⁶ *Ibid.*

⁷⁷ <http://www.ingenta.com/corporate/> (last accessed, 8 August 2006).

communities. In May 2000 it became a publicly listed company of the Alternative Investments Market (AIM) of the London Stock Exchange⁷⁸. HERON now has seventy-five subscribing institutions across the UK with University of York being the most recent HEI joining HERON⁷⁹.

Therefore, apart from the main aim of serving the interests of academic institutions, in relation to online access, the service is reflective of keeping up with modern times. It serves distance-learning students and is an option which can be adopted by e-universities in the future. Since HERON is a service which has grown from within the academic sector, it is taken forward largely by its subscribers and by the HERON staff, who have an academic background and who understand the needs and concerns of the sector.

Benefits of HERON and how it differs from CLA

One of the most important benefits and significant differences from the existing collective licensing system utilised by CLA is that the digitised materials provided by HERON can be used very flexibly. They can be viewed on screen, downloaded to disc or printed out. Students can also return to the material as often as they need to, for no additional cost because HERON is not a pay-per view service. Most importantly, therefore, once the material is licensed to the institution, it may be used by students as frequently as they wish, as long as it is within the period for which the institution has been given a licence to use the material. In comparison and as already discussed in Chapter 6, under the heading, 'A Critical Analysis of the Higher Education Copying Accord: Trial Licence for Photocopying and Scanning, August 2005' the stringent rules of CLA which state that the use of electronic copies will be charged per copy and depend on the number of students enrolled in a particular course and utilising the electronic copies – do not apply here. HERON clearly solves this problem that HEIs face at present.

A second significant benefit and major difference from CLA is the introduction of the PackTracker system by HERON. The electronic course-packs are similar to the course-packs which were at the heart of the controversy in the *UUK v. CLA* case referred to in chapter 6. By using digitised texts, academic staff can provide access for students, and ensure that the students are better prepared for lectures and tutorials, with time not wasted in

⁷⁸ Information taken from <http://www.ingenta.com/corporate/company/investors/> (last accessed, 5 August 2006).

⁷⁹ For a list of subscribing institutions to HERON, see, http://www.heron.ingenta.com/finding/finding_subscriber.html (last accessed, 8 August 2006).

explanations or providing additional copies of key texts. Informal feed-back to HERON has already shown that, where course materials are provided electronically through the PackTracker system with their use being prompted by the academic staff concerned, students have shown much enthusiasm about the changes it can bring and have asked for an extension of such provision for other courses⁸⁰.

The difference and strength brought about by HERON is further re-affirmed by a Librarian at the University of Nottingham –

After 25 years in the profession I have seen many things come and go. HERON is one of the good ones, so I hope things go from strength to strength⁸¹.

A third significant difference brought about by HERON is that key texts can now be delivered to students simultaneously and can be accessed without a student needing to come to the library⁸². Although this may appear to be an obvious benefit in the digital era, HEIs who are not party to HERON (for example party only to the CLA system) are unable to grant student access to digitised texts off-campus. HERON bridges this gap permitting students to access materials from outside the university in the exact same manner they would access such material from within the university. As a result, students get the material they want and the damage and loss to library stock is also eliminated. In the same context, time is also saved as library staff do not have to undertake the complex procedure of copyright clearance themselves and staff can also be confident that compliance with copyright conditions is assured where material is ordered through the HERON service.

HERON is aware of the legitimate concerns of the rights holders' community regarding issues related to revenue and loss of control over the content of their material, and therefore works closely with right holders and their representatives. At the end of December 2005, twenty-one publishers had signed direct mandates with HERON, thereby providing copyright permission for the use of their material. Amongst the twenty-one, the following are worthy of mention: Bloomsbury, Emerald Publishing Group, John Wiley & Sons Ltd.,

⁸⁰ About HERON, 'Why use HERON?' at http://www.heron.ingenta.com/about/about_why.html (last accessed, 8 August 2006).

⁸¹ Bragan-Turner D., Arts Librarian, University of Nottingham. Quoted in HERON home page at <http://www.heron.ingenta.com/index.html> (last accessed, 7 June 2006).

⁸² *Op. cit.*, n. 80 'library staff'.

Kluwer Academic, Open University Press, Oxford University Press (Journals), The Royal Society, Taylor & Francis Ltd., (Books), University of Chicago Press and The World Health Organisation⁸³. A move towards the digital era and HERON by the publishers rectifies the problems which have been faced in the printing environment, such as publishers having too much power. The fact that amongst others the above named publishers have become members of HERON means that publishers will continue to be remunerated through HERON for the use of their journal articles or book extracts, but with the focus on the needs of HEIs and therefore on HEIs terms. Publishers who have made the move towards HERON will be aware of this along with the fact that HERON was created from within the academic community for the academic community.

To sum up the benefits of HERON, the following can be set out –

HERON, with its roots in Higher Education sector and a history of pioneering the clearance and use of digitised materials in education, in an ideal position to understand the needs of both its subscribers and right holders. Acting as a one-stop-shop clearance and digitisation service, HERON reduces the workloads for both parties⁸⁴.

However, a drawback of HERON is that it has digital material, but does not provide a reprography service. Therefore HEIs are still obliged to rely on CLA for clearance and copy licences for reprography services. This means that even if HEIs become members of HERON, they still have to go through CLA for copyright clearance for photocopying material. Therefore, at the moment certain universities continue to use CLA for copyright clearance and use HERON for access and use to research databases such as ATHENS. As a result, even if getting round the stringent rules imposed by CLA on the use of electronic resources may be overcome through membership with HERON, which may prove more attractive, a result of the constraints imposed on the reprography service by HERON is that educational establishments ultimately have to rely on collecting societies such as CLA for copyright clearance.

The system seems to have been further complicated by the introduction of the Licence for Photocopying and Scanning, introduced by CLA in August 2005. This licence amalgamates

⁸³ For a list of all publishers, see, HERON: FAQ at <http://www.heron.ingenta.com/faqs/faqs.html#mandates> (last accessed, 8 August 2006).

⁸⁴ See, <http://www.heron.ac.uk> (last accessed, 8 August 2006).

reprography and digital services and therefore questions whether an institution party to this licence, is party to both the reprography and digital services? It was confirmed by CLA that an HEI party to the licence can opt to be party to the reprography service and yet opt-out of the digital service, and hence, be able to reap the benefits provided by HERON for digitised texts and copyright clearance. This would also mean that the licence fee HEIs pay CLA would be less than the standard £4.92, which applies to the amalgamated licence for photocopying and scanning.

Suggested proposal for a better system for academic authors and HEIs

What is needed at present is a system modelled on the principles of HERON – that is a system which would also be a designated Trusted Repository taken forward largely by its subscribers and by the HERON staff who have an academic background and understand the needs and concerns of the sector – but also a system which can serve all the copyright needs of HEIs. It seems almost impossible to get round the issue of reprography and therefore for institutions using reprography services, they will inevitably have to be members of CLA as well, which is a significant drawback. However, with HEIs becoming more and more involved in e-learning distance learning through electronic means and e-universities, it seems likely that academic institutions will place more reliance on digitised texts and articles in time to come. In relation to both reprography and digital services, the discussion in chapter 6 illustrated the problems associated with distribution of remuneration owed to rights holders. Whilst collection of licence fees runs smoothly within CLA (as a result of strict copyright compliance by HEIs in UK), distribution of the licence fee was the issue, which has led to a number of problems. Therefore, the present proposal will also address this problem: how a system of fair distribution can be introduced based on the principles of CCS and particularly built around the concept of HERON, which serves the academic community. A further matter which arises from the distribution of licence fee and which has come up time and again has been the issue of fair remuneration for authors: how are academic authors to be fairly remunerated? The present recommendation will also deal with this issue and suggest a possible solution.

The proposed suggestion in the present thesis is therefore based on the HERON system and furthermore draws upon the author-pays or open-access system. In support of the recommendation, it is submitted that the concept of a collecting society has a number of benefits, which cannot be disregarded. It is for this reason that the proposal is based on the HERON model, which has in turn been modelled on the concept of a collecting society –

except that in the case of HERON, its main interest stems from the academic community, for the academic community. In the same manner, the present proposal draws on the strengths of HERON, thereby providing a one-stop-shop to provide for copyright clearance, digitisation and delivery of book extracts and journal articles. This will give universities and colleges access to key learning materials for all their students, wherever they are based. The fact that HERON provides for digital material only can also be a strength to the proposed suggestion, especially where fair remuneration for right holders is concerned, as explained below. As already set out in the abstract to the thesis, 'remuneration' in this thesis is used not only in an economic sense as the word represents, but is used as a 'reward' mechanism in assessing how best the academic author can be recognised and rewarded for his or her academic publications. As such, it must be re-iterated that whilst remuneration on the one hand can lead to remuneration through royalties, on the other hand, and in the present context, it can represent a support system for the author through the author-pays and HERON systems. The author-pays system in this sense is a considerable benefit in the sense that the research institution or departmental institution will pay the author fee or the publisher waive the fee, where they strongly feel that the article is of a very high quality – in order to maintain the standards of the academic institution and preserve the quality of the publication journal. This kind of system represents recognition and reward of academic efforts, which the present writer supports.

RAE and author-pays systems (open-access) meets HERON: A critical analysis of the working model

Chapter 2 of this thesis set out the manner in which the Research Assessment Exercise (RAE) works. According to the suggested model, and in addressing the concerns of academic authors, it is submitted that when HEIs strive for a five-star rating in the RAE, hoping for more research funding as a consequence, they should also bear in mind the portion of funding that could be set aside for authors' publications, which will be distributed to authors through the HERON model. This point is further elaborated in the following pages.

As already explained, it is possible to create a more effective system with the use of public funds just once in the production of research outputs. The system will work as follows. HEIs will strive for a five-star rating in the RAE in accordance with the present system, enabling institutions conducting the best research to receive a larger proportion of the available grant so that the infrastructure for the top level of research in the UK is protected and developed. However, according to the present proposal, when applying for the public

funds the number of publications by academic authors will be clearly set out, and it will be agreed amongst all HEIs that HERON will receive a slice of the public funding available to each HEI according to their publishing record. The rest will be received by the respective HEIs according to their publishing strength

As well as acting as a clearinghouse, it is suggested that HERON will also act as the body to which authors can apply for publication costs. Contrary to the existing system where public funds are used three to four times, according to the working model they will be used once. For example, whilst public money will fund the author's project through HERON, because of the open-access initiative used in the proposed model, authors will not expect remuneration for the non-commercial use of their literary works by the HE and academic sector, and libraries will have to pay less for subscription-based journals if more emphasis is placed on electronic journals. Furthermore, although a licence fee will have to be paid to HERON for access to digital texts and as such to remunerate the publishers, HEIs would benefit from HERON's flexible system.

The difference in this system is that CLA is seen to be mainly dictated by the publishers', with the publishers making the major decisions about the direction of the organisation. The HERON system focuses on the academic community and academic authors, which means that not only are HEIs responsible for the amount which goes into the HERON 'bank' but also they have an upper hand in relation to publishing, in accordance with the author-pays system. Unlike the traditional collecting society system, rather than HEIs taking a back-seat and paying the licence fee for the use of copyright works, they can now not only benefit from the same as far as digital copyright works are concerned, but have more authority as far as academic authors are concerned. According to this system, academic authors are given the opportunity to publish without having to assign all their copyright to the publishers and most importantly, although they are not always remunerated for their work afterwards, the costs of publication are met by HERON. As explained above, publishers using the open-access system can choose from four different licences (Models A-D). Where academic authors publish books, book extracts, journal articles, case reports etc. the costs will continue to be met by HERON, through the HERON digitisation licence, hence keeping the publishers happy.

One of the main advantages of the HERON system as already set out, is the higher level of control by HEIs of the use and access to copyright works. Apart from this benefit, academic

authors face a double-victory through this system. They are not under any promise or 'delusion' of being remunerated for the use of their works through a copyright collecting society such as CLA. They also have the option of deciding whether they would like to keep the copyright to their works and assign the commercial exploitation rights, or keep both, or assign both as explained in Models A-D above. Although open-access promotes free access for non-commercial use, as a result of the academic publications, academics can look forward to promotions within their institutions and also use the publishing record to apply for further public funding. It must also be borne in mind that not all of universities' funding comes from the public funds. Commercial exploits within universities already generate much income for HEIs, which can be used to develop and promote research interests within universities. As such, the 'slice' of public funding channelled to HERON is purely for the benefit of authors who need funding to carry out their research.

As Lee Davis, points out in his article 'Should the logic of 'open source' be applied to digital cultural goods? An explanatory essay'⁸⁵ there is little doubt that the publishers of academic journals benefit if potential readers learn about their articles, via online access over the Internet. But if users simply download and print the articles and if university libraries do not buy hard copies, publishers may well lose revenues. These issues beg the question: what motivates academic authors and publishers to be a part of open-access and also a part of the suggested working model? The response is quite simple – as far as authors are concerned, it provides a special type of incentive structure based on recognition and reputation benefits, which are two factors paramount in the HE sector. This is because academic authors receive their economic remuneration through recognition and reputation, which in turn leads to promotion and therefore higher salaries within the HE sector. Furthermore, the HERON model acts as a clearinghouse, and provides a digitisation licence which ensures that publishers are remunerated. Although publishers may not play as big a part as in CLA, it appears that more and more HEIs are moving towards the HERON system. Survival of academic publishers will depend on whether they are willing to be party to the HERON system. A move will be advantageous, as they will continue to serve the academic community and receive remuneration for access to their material. The distinguishing difference for publishers in the open-access/HERON system is that HEIs will be spared the money in 'buying back' journals to which academic authors have already contributed.

⁸⁵ Davis L., Should the logic of 'open source' be applied to digital cultural goods? An explanatory essay, in Porsdam H., (ed.), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (Cheltenham UK, Massachusetts USA: Edward Elgar Publishing Ltd.; 2006), chapter 7.

Under this system, as HEIs will not invest in subscription-model journals, which are in digital format, publishers will lose out although they will still receive the licence income for accessing and downloading digital material. These are some of the motivating factors, which make the open-access system coupled together with the HERON model a more desirable solution for academic authors and a means of survival for publishers already serving the HE sector.

As HERON is a Trusted Repository, it makes life easier for authors as they are able to hand over preservation and sustainability to someone else. From the reader's point of view too, being able to rely on repositories for usable versions of publications, like current-format ones of older papers, is clearly also an advantage⁸⁶. However, in the open-access system one of the important characteristics, especially for academic authors as noted above, is the proper attribution of authorship. Yet, one of the drawbacks of the digital era is the ease with which copyright works can be reproduced and most often without proper attribution to the author. Such reproduction, which goes beyond non-commercial use, defeats the purpose of the open-access system. A possible means to meet this issue is to use plagiarism detection software (PD software). There is however a strong argument against its use due to its inaccuracy. In a study carried out by Braumoeller & Gaines, it was pointed out that almost every review of PD software reports that the software package in question often highlights material as being plagiarised when in fact it is an example of correct citation practice⁸⁷. A second problem which they identified with PD software relevant to HEIs, is incompleteness. Whilst all the software packages make use of internet-based sources, and some have their own databases, only a few are able to scan printed sources of any kind, making PD from textbooks difficult. The same study pointed out that paper mills and other websites that support re-publishing of previous good material actually assist PD software, for their mission to provide students with the best material to copy often leads them to scan and (illegally) publish printed material online, or to make illegal copies of online newspaper/journal articles and other materials not normally available to PD software⁸⁸.

⁸⁶ *Op. cit.*, British Academy Policy Review n. 42 at p. 81.

⁸⁷ Braumoeller B. F., *Actions Do Speak Louder than Words: Deterring Plagiarism with the Use of Plagiarism-Detection Software* (December 2001) vol. 34, no. 4 PS: Political Science and Politics pp. 835-839. An electronic version can be found at http://www.apsanet.org/content_12743.cfm (last accessed 8 August 2006).

⁸⁸ *Ibid.*

A main drawback of the proposed model as already pointed out above is that it does not provide for a reprographic service. HERON serves the digital community. Therefore, this proposed model, although it could be beneficial for academic authors and possibly, even for publishers, still raises questions about the use of and remuneration for hard copy subscription model journals. As the system stands, it appears to be the case that HEIs who wish to use the more flexible and attractive working model will still have to obtain a licence from CLA for photocopying, unless HERON addresses this issue. It is submitted that this is an issue, which HEIs along with HERON must attempt to get around. At the time of writing this thesis, the writer is unfortunately unable to provide a solution in this regard, although this is an area in which the present research work will continue to develop.

Focusing on the suggested proposal itself, it can be pointed out that HEIs with a weak publication record will also have the opportunity to apply to HERON for research funding. This makes the system appear unfairly biased towards HEIs with a strong publishing record, which will take a larger proportion of the research funding. However, academic contributions from HEIs have to undergo the peer review system before the articles are published in an open-access journal. This in itself encourages a better publishing record. Furthermore, although HEIs with a stronger publishing record may have more of a say in the remuneration available to academic authors, HEIs with a weaker publishing record can ensure that they improve their academic contribution, supported by the suggested proposal, designed especially for academic authors, thereby improving on academic contributions overall. In bringing this chapter to a conclusion, the table below distinguishes between CLA and HERON and sets out the strengths and weaknesses of the two organisations and the suggested proposal by the author.

CLA	HERON
CON	STITUTION
<ul style="list-style-type: none"> ❖ Non-profit making company ❖ Set up in 1982 ❖ Legal Constitution is governed by section 263 of Companies Act 1985 	<ul style="list-style-type: none"> ❖ Initiated as a phase three eLib project in 1998 ❖ In March 2002 HERON was acquired by Ingenta ❖ Until September 2006 was a Trusted Repository of CLA
KEY	FEATURES
<ul style="list-style-type: none"> ❖ Collecting agency which acts on behalf of authors ❖ Publishers and artists and negotiates licences on behalf of these categories of people ❖ Collects the licence income and distributes them through the Authors Copyright Licensing Society (ALCS), Publishers Licensing Society (PLS) and Design And Artists Copyright Society (DACS) ❖ CLA Provides a reprography and digitised service; CLA provides both educational and business licences 	<ul style="list-style-type: none"> ❖ Created by those in academia for those in academia ❖ Does not deal with licences for reprography ❖ HERON is a one-stop-shop which provides for copyright clearance, digitisation and delivery of book extracts and journal articles enabling universities and colleges to provide ❖ Access to key learning materials for all their students, wherever they are based
DIFFERENCES	IN LICENCES
<ul style="list-style-type: none"> ❖ Blanket licence system now applies to electronic licence as well and the fee will depend on the number of students enrolled in a particular course and utilising the electronic copies ❖ Under the licence with CLA, HEIs will have access to CLA's repertoire and to copyright works held within that repertoire ❖ Until recently (August 2005) CLA offered separate licences for reprography and digital services ❖ In August 2005 these two services were amalgamated to provide a single service ❖ This also meant that the licence fee since August 2005 was raised to £4.92 	<ul style="list-style-type: none"> ❖ Tailor-made for HEIs ❖ Digitised materials provided by HERON can be used very flexibly, they can be viewed on screen, downloaded to disc or printed out ❖ Students can also return to the material as often as they need to, for no additional cost because HERON is not a pay-per view service ❖ HERON especially significant in the wake of e-distance learning ❖ Neither CLA licence nor the present law permits the distribution of copyright protected electronic material to distance learning students, HERON makes this possible as they are able to approach individual publishers out with their repertoire to serve the needs of HEIs ❖ Payment is calculated according to the number of materials by separate HEIs and therefore, the subscription rate will differ according to the size of a university
SUGGESTED	PROPOSAL (BY AUTHOR)

<ul style="list-style-type: none"> ❖ CLA ‘remunerates’ authors, publishers and artists through the ALCS, PLS and DACS as pointed out above ❖ However the study carried out in the thesis illustrated that the ‘remuneration’ process does not work effectively and academic authors in particular are not being remunerated for their academic works 	<ul style="list-style-type: none"> ❖ HERON/RAE/open-access system will provide more of a ‘support’ system to the academic author rather than attempt to remunerate the academic author – which is not working at the moment ❖ Support will be given at the outset to carry out the research depending on the amount of money each university has contributed to the ‘HERON bank’ through the RAE system ❖ A further possibility is also to request an open-access publication from the author, which will then become part of the HERON repertoire ❖ In this manner the HERON repertoire can grow whilst academic authors throughout UK can also succeed through the additional support system
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Conclusion

In concluding this chapter, the words of Uma Suthersanen are appropriate to illustrate that throughout the centuries the literary hero, the author, has slowly but surely been coming to the forefront.

One should note that by the end of the eighteenth century, copyright had yet to impact upon authors’ lives in terms of remuneration – most authors were paid a lump sum for their work as opposed to sales-based royalties, and moreover authors were required to assign their copyrights to their publishers – much like today’s academic journal authors...⁸⁹ With the expansion of the market for popular books in the nineteenth century, the book trade grew proportionately, enabling publishers to pay more for manuscripts. Consequently the author’s status changed and the profession of authorship slowly emerged. This inevitably led to copyright being viewed as an important economic tool for the protection of both authors and the industry that disseminated the written work⁹⁰.

There is much discussion that can be drawn from the above quote. First, although the quotation is directed very much at literary heroes such as Charles Dickens and William

⁸⁹ Suthersanen U., *Bleak House or Great Expectations?* The literary author as a stakeholder in nineteenth-century international copyright politics in *op. cit.*, Porsdam H., n. 85 (ed.) at p. 42.

⁹⁰ *Ibid.*, at p. 45.

Wordsworth, the same is true of academic authors as well, who have been achieving more and more recognition throughout the centuries. Secondly, the quote likens eighteenth-century authors to today's academic journal authors, who do not receive economic remuneration in the form of sales-based royalties. This as discussed above is very true, which was the reason for proposing a working model for academic authors who contribute to journals amongst other contributions. Extending this point further, it is because academic authors view copyright as an economic tool, whether it be through recognition or reputation, which brings with it promotion and therefore economic remuneration, that distribution of licence income to academic authors through CLA became an issue. The quotation ends with a reference to the industry, which disseminates written work – i.e. the publishing industry. It is clear from the above discussion that publishers have definitely embraced copyright as an important economic tool and have dominated in this respect.

However, the digital era has paved the way for authors and particularly academic authors to come into the limelight once again and ensure that publishers take more of a back-seat in the HE sector. The need for more recognition of the author came about following publishers dominating the copyright industry during the twentieth century. Once again to quote Suthersanen 'the virtual disappearance of the author in the twenty-first-century copyright discourse contrast sharply with the rise of the author in the early nineteenth century ...'⁹¹. The early years of twenty-first century saw publishers going from strength to strength as explained above. Therefore the emergence of the World-Wide-Web and the Internet towards the latter years of the twentieth century was a welcome development for authors who found a way to put the brakes on the ever-growing success of publishers. Time will tell whether models such as HERON and the author-pays or open-access model will truly allow the author to take precedence in the copyright world.

⁹¹ *Ibid.*, at p. 40.

CONCLUSION

CHAPTER 8

CONCLUSION

In order to arrive at the main conclusions and the suggested proposal for a better system for HEIs and academic authors in their interaction with copyright collecting societies, a lengthy journey spanning seven chapters was undertaken by the writer. In considering the arguments of those seven chapters the following broad conclusions can be arrived at. Where the reproduction of copyright works within HEIs surpasses the scope of the fair dealing exception, collective licensing through the system of copyright collective administration appears to be the most suited solution. However, due to the drawbacks of the present system of collective licensing administered by CLA in their interaction with HEIs within the UK, a new model based on the HERON project and incorporating the open-access system has been suggested in this thesis. The proposal as explained in the previous chapter draws on the fundamental principles of collective administration but is tailored with HEIs and academic authors in mind. If authors and academic authors did not exist there will not be a need or a place for agencies such as the CLA. William Cornish explains the importance of academic authors in his article 'Authors in Law' as follows –

If authors survive, and in practice they will prove hard to kill, then it is crucial, among all difficulties that their interest is not attenuated simply because of the grave difficulties of bringing copyists to book. Digitisation will force the march – already well under way – towards collective administration of rights ... The best hope, so far as earnings are concerned, is indeed that interests will be represented through collectivities of authors, composers and artists¹.

Although this article was written almost a decade ago, it recognises two important issues that are equally significant today: that authors will continue to create literary works in a world where reproduction of copyright works has become increasingly convenient through the Internet and as far as collecting remuneration due to them and keeping transaction costs to a minimum are concerned the best hope for authors is the system of copyright collective societies. As such, this quotation by Cornish also assists to explain the reason why the new model suggested in the present thesis rests on the foundations of the copyright collective administration system. It is a case of 'new wine in old bottles': the concept on which

¹ Cornish W. R., *Authors in Law* (1995) 58(1) *Modern Law Review* 16.

collecting societies are built stands strong, but the system, which it operates is clearly in need of change.

In concluding this thesis, it is timely and appropriate to trace the steps, which were taken, to arrive at the above mentioned broad conclusions. It must also be pointed out that each chapter has already been brought to a close with a detailed analysis and a conclusion, and therefore, the aim here is to bring those conclusions together in order to summarise the thesis as a whole.

Chapter one laid down the foundations to this thesis, by exploring the need for exceptions to rules and in particular, the exceptions to copyright rules. The purpose of this chapter therefore, was very much to trace the historical development of copyright law, particularly, exceptions to copyright law in the UK, making references to the effect it had on HEIs, where appropriate. In carrying out the historical development, the chapter focused on two main factors: the role of the printer and author on the one hand and the role played by public interest as a defence to copyright on the other. In relation to the role of the printer and author, the chapter illustrated the power which was enjoyed by the printers, until for the first time, the authors' rights were recognised by the Statute of Anne 1709 and later the Berne Convention 1886. Until 1709, the printer/publisher was the main player in the copyright game. As such, the printers did not look at the Statute of Anne favourably and contested the loss of the perpetual right to copyright by the Act, which led to an examination of the public interest debate. Whilst the Court of King's Bench in *Millar v. Taylor* held that there was a common law right of an author to his copy stemming from the act of creation, the perpetual right was not removed by the Statute of Anne. However, the House of Lords in the case of *Donaldson v. Beckett* overturned this decision one year after the Scottish Court of Session had already arrived at the same ruling in *Hinton v. Donaldson*. Although statutory exceptions to copyright came into being in the UK during the 20th century, the common law right of public interest continues to play a role as was seen in the cases of *Hyde Park v. Yelland & Others*, *Ashdown v. The Telegraph Group Ltd.* and *HRH The Prince of Wales v. Associated Newspapers*.

Chapter two discussed the issues thrown up by copyright law, technology and HEIs in the modern era. As such, one of the main purposes of this chapter was to focus and ascertain the effect which copyright law had on HEIs throughout the 20th and at the beginning of the 21st centuries, especially, bearing in mind the technological advancements during this time. In

this context, the issue, which the writer attempted to deal with, was the situation of the law where the reproduction of copyright works surpassed the scope of the fair dealing exception. Therefore, the aim of chapter two was to portray and trace the modern development of copyright law and technology and their intrinsic link with HEIs, whilst at the same time introducing and tracing the progression of copyright collecting societies, particularly, CLA, from the late 1970's. The chapter then moved on to the 21st century and carried out an analysis of certain clauses of the InfoSoc Directive applicable to HEIs and its implementation in the UK in the form of the Copyright and Related Rights Regulations 2003. The broad conclusion which is drawn from chapter two is that copyright law will continue to be challenged by technological advancements but will also continue to adapt by manoeuvring copyright laws to suit the changing times. For example, the development of CLA to deal with the reproduction of copyright works within HEIs and the introduction of the non-commercial exception in the InfoSoc Directive to facilitate research and private study are two such examples, which illustrate the manner in which copyright law had to adapt, to deal with technological developments, and in the present context, in light of the challenges faced by HEIs.

Chapter three looked at the other side of the argument and considered the manner in which the development of HEIs had an impact on copyright law. The chapter demonstrated the development of HEIs, especially in the 1960's, which acted as a trigger for the setting up of CLA. The increase in the number of students leading to the 'university boom' coupled together with the 'photocopy boom' during the same decade brought copyright infringement to a head. In other words, with a large number of students having access to technological equipment such as photocopying machines meant that the scope of the fair dealing exception was questioned and the need for an organised system of licensing between HEIs and authors was seen as essential. It was felt that an organised system of licensing would ensure the 'proper' use and reproduction of copyright works within HEIs on the one hand and fair remuneration for right holders' in the form of royalties on the other. As such, the first part of chapter three considered the impact brought about by the advancement in the educational sector together with the development in technology.

Part II of chapter three considered the position of the academic author in these changing times. Whilst UK law favours the copyright to vest in the employer where the employee has carried out the work in the course of his or her employment, a number of arguments were presented to exemplify that according to 'custom' this is not always the case, particularly, in

relation to the ownership in research materials. With reference to the studies of Gadd, Oppenheim and Proberts, Part II of chapter three portrayed that HEIs do not have a specific copyright policy in place as far as academic authors are concerned. Very often academic authors assign their copyright to publishers in exchange for publication. In this context, chapter three questioned whether academic authors are more concerned about the *intellectual* element of intellectual property, than the *property* one. After all, it is true that academic authors are more concerned about publication of their work and the resulting recognition and reputation in their respective academic fields which in turn leads to promotion and higher salaries over and above economic remuneration in the form of royalties. However, the chapter argued that the party who should be entitled to the copyright in research material should be the academic author. The main reason for this is because the desire and ability to pursue scholarly research is seen as part of an academic freedom. As Monotti and Ricketson identified and as already set out, a point to stress is that 'freedom to develop one's particular research agenda also bolsters an argument that the academic owns copyright in research output'².

Although we have come a long way in relation to the law, technology and HEIs, the challenges faced by copyright law are still pertinent and recognising this fact, the Chancellor of the Exchequer announced on 2 December 2005 that an Independent Review be carried out to examine the UK's intellectual property law, headed by Andrew Gowers (hereinafter Gowers Review)³. This review bears similarities to the review which was carried out during the 20th century, in particular, to the Whitford Committee Report 1977, set up to examine and consolidate the UK's intellectual property laws. The Gowers Review accepts that the present UK system strikes broadly the right between consumers and rights-holders, but also accepts that there are a variety of issues with the existing framework⁴. The Call for Evidence for this Review closed on 21 April 2006⁵ and a large number of responses were submitted. Amongst the issues, which were available for comment, copyright exceptions were very much at the forefront.

² Monotti A., & Ricketson S., *Universities and IP: Ownership and Exploitation* (Oxford, New York: Oxford University Press; 2003), p. 273; see also *supra* p. 114.

³ HM Treasury, Gowers Review of Intellectual Property at http://www.hm-treasury.gov.uk/independent_reviews.gowers_review_intellectual_Property.htm (last accessed 5 August 2006).

⁴ *Ibid.*

⁵ HM Treasury, Gowers Review of Intellectual Property issues call for evidence (23 February 2006) at <http://www.hm-treasury.gov.uk/gowers> (last accessed 5 August 2006).

The Review identified the following copyright issues as those, which needed consideration—

The widespread use of the Internet and the advent of high-speed digital networks has made it increasingly easy to copy and share digital information quickly, easily and without appreciable loss of quality. This has enabled widespread copyright infringement, most notably the use of file sharing technologies to download unlicensed music. It has been suggested that copyright exceptions lack clarity and are ill equipped to deal with these technological challenges. Furthermore public awareness of the boundaries of lawful use is low, and legal sanctions on infringement appear to lack clarity and consistency across different forms of IP.

There may also be a number of barriers to efficient markets for copyright licensing. A significant proportion of copyrighted works are presently unavailable because they have little private value to the existing rights holder – they do not merit the cost of being re-issued. Such works are therefore inaccessible to consumers and to other firms wishing to licence or purchase the rights, and it often becomes difficult to trace the authors and right holders of such work.

The above quotation makes two interesting points. First, the quote identifies the existence of technological equipment as a facilitator for copyright infringement and secondly questions the ownership and use of copyright. The second point was dealt with in chapter three. In relation to the first part of the quote, chapter four of this thesis dealt with this issue in considerable detail.

Chapter four focused on the installation and sometimes – ‘inappropriate’ – use of modern technology. The Australian case of *Moorhouse* illustrated the manner in which a university can be held liable for copyright infringement for the installation of copying machines without appropriate guidelines in place. This case together with the *Canadian CCH case* questioned whether the existence of photocopying machines within university premises or library premises was an ‘invitation to copy’. Whilst the 1975 *Moorhouse* case held that the University of New South Wales was liable for placing copying machines within their premises without appropriate guidelines, thereby, handing out an ‘invitation to copy’ the *CCH Canadian case*, three decades later, concluded that the Law Society of Upper Canada did not authorise copyright infringement by providing self-service photocopiers and copies of the respondent publishers’ works for use by its patrons in the Great Library. The British *Amstrad*⁶ case decided in 1988 also queried the issue of ‘invitation to copy’ or ‘authorise’ to

⁶ [1988] R.P.C. 567.

copy in the case of twin-tape recording equipment. This case held that *Amstrad* had not 'authorised' copyright infringement by the act of installing or selling double-twin recording equipment. Considering the three cases collectively, an important point, which must be raised, is that they illustrate that as technological equipment become more advanced and more commonplace, it becomes increasingly complex to hold the manufacturer liable for the creation of such equipment or to hold an institution liable for the installation of such equipment in their premises. However, the advent of file-sharing technology or peer-to-peer (P2P) file-sharing system in the late 20th and early 21st century brought this question to the forefront once again. File-sharing technology permits copying data from computer to computer. As such networks for file-sharing such as *EDonkey*, *FastTrack* and *Gnutella* can be used to share family photos, free software, licensed music and any sort of digital content including copyright works.

However, file-sharing have come under the watchful eye of the record industry that has lost millions of dollars in music sales as a result of file-swapping⁷. As a result, before long, the record industry brought a case against one of the major networks for file-sharing – *FastTrack* – upon which the *Grokster* technology is based for permitting copyright infringement by the existence of file-sharing technology. Similar to the *Moorhouse*, *Amstrad* and *Canadian CCH Ltd.* cases, opinions differed in the *Grokster* case⁸ on the issue of whether the *FastTrack* network had infringed copyright by installing software, which had the capability of being used illegally. For example –

But we should applaud the 9th US Circuit of Appeal in Los Angeles for making it clear that file-sharing is not illegal⁹.

... There is a well-established precedent in US law that just because something is capable of being used illegally, that does not mean its manufacturers can be sued or prosecuted¹⁰.

⁷ File-sharing networks fight back BBC News (30 September 2003) at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/3151886.stm> (last accessed 20 July 2006).

⁸ *MGM Studios, Inc., v. Grokster Ltd* 380 F.3d 1154 (9th Cir. 2004).

⁹ Bill Thompson, Fight for right to copy BBC News (20 August 2004) at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/3584010.htm> (last accessed 20 July 2006).

¹⁰ *Ibid.*

It would, as the Electronic Frontier Foundation points out, probably allow the record companies to sue Apple for making and marketing the iPod since it indirectly encourages us all to copy our friends' CDs¹¹.

However, despite such strong arguments in favour of the valid use of P2P technology, the file-sharing group *Grokster* agreed to halt distributing its software to settle the long-running copyright case¹². Under the deal, *Grokster* was permanently banned from taking part in the spread of copyright music and movie files. It agreed to stop activity that leads to copyright infringement, as well as paying \$50m (£28.7m) in damages, which was hailed as a victory for the entertainment industry's fight against online piracy¹³.

In relation to the three cases discussed in chapter four, it was already set out that it would be a challenge to bring a copyright infringement case against manufacturers who manufacture and install electronic equipment which has the capability of reproducing copyright works in a world where such electronic equipment is commonplace and highly advanced.

However, the *Grokster* case, in the 21st century, turned this argument over once again and concluded that in the case of manufacturers who manufacture file-sharing software, which ultimately proves costly to the entertainment industry, the manufacturers of such technology can be held liable for the action of their users. This decision in some sense reflects the *Moorhouse* decision that file-sharing was an 'invitation to copy'. However, the *Grokster* case did not mean an end to illegal file-sharing using *Grokster* software. Therefore, although it is possible to play with the idea of applying a file-sharing network between HEIs in the UK, the consequences, which can arise from it, can be more detrimental than useful, particularly, considering the launch of *Relakks*¹⁴ which allows users to share files anonymously on the world-wide-web¹⁵. Whilst *Relakks* has the advantage of being confined to a small tight-knit group, which can advantage HEIs, the anonymity which goes with it, questions its adherence to copyright law.

¹¹ *Ibid.*

¹² *MGM Studios, Inc., v. Grokster Ltd* (04 –0480), 545 U.S. 125 S. Ct. 2764 (2005).

¹³ See also, *Grokster quits file-sharing fight*, BBC News (8 November 2005) at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/business/4416484.stm> (last accessed 20 July 2006).

¹⁴ *Relakks* is a Swedish company and users who sign up to it paying five euros or £3 a month will be able to use the Internet and the P2P software 'without fear of being monitored or logged'. See *File-sharing 'darknet' unveiled*, BBC News (16 August 2006) at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/4798059.stm> (last accessed 18 August 2006).

¹⁵ *Ibid.*

Chapter five focused on copyright collecting societies and in discussing the concept of collecting societies concentrated on two of their distinctive features: reduced transaction costs and the monopoly aspect of copyright administration. The chapter commenced by looking at the various copyright theories put forward by economists from 18th to the 20th centuries. Chapter five, in this context, considered whether copyright is a harmful or harmless monopoly from the viewpoint of economists such as Adam Smith, Jeremy Bentham, Lord Macaulay and Henry Sidgwick. In relation to this issue and based on the views of the above mentioned economists, this part of the chapter concluded that although in the early years – 18th century – copyright was viewed as a harmless monopoly by economists such as Adam Smith, as time moved on, and as copyright assumed an economic role for the benefit of authors and publishers alike, it was established that copyright monopoly was not ‘special’ and can be as harmful as any other monopoly, if abused. The 20th century economists such as Sir Arnold Plant, Novos and Waldman, Landes and Posner set out a more balanced view. Particularly, during the 1970s, Landes and Posner, consolidating the previous theories correctly concluded that copyright could have both economic costs and benefits. Copyright provides the right holder with the benefit of an economic right and therefore a right to remuneration, whilst also ensuring the development of a literary society. However, on the other hand, it will also means that the right holder will have to face costs, particularly, in terms of the cost of protection and transaction costs; and increased protection to avoid piracy and infringement will in turn prove to be costly to the literary society.

Having dealt with the monopoly aspect of copyright, the chapter then moved on to consider the concept of reduced transaction costs as a basis for setting up copyright collecting societies. It was accepted and concluded that reduced transaction costs was one of the more attractive reasons for the evolution and progression of collecting societies. This part of the chapter, considered the nature and benefits of reduced transaction costs. In doing so, chapter five took into account the Coase theorem and the importance of transaction costs in considering the efficiency of contractual arrangements. Ronald Coase also argued in favour of zero transaction costs, which however, was criticised for its unrealistic nature in a practical world by other economists such as Guido Calabresi, Douglas Melamed, Landes & Posner and Robert Merges. Later, as Coase himself recognised, where the transaction costs are positive, as in the legal domain, law can encourage bargaining by lowering transaction costs. With regard to the relationship between transaction costs and licences, the chapter argued in favour of CCS as opposed to compulsory licensing based on the arguments

developed by Robert Merges. Merges argued that 'CCS outperform compulsory licences in lowering transaction costs.' Whilst CCS increases access to copyright works of rights holders in return for a licence fee, which minimises the costs of permitting access to their works, it also ensures that the needs of each client can be met separately, thereby providing an 'expert-tailoring' system.

The chapter then pointed out that in the digital age transaction costs can be reduced significantly. The European Commission recognised this advantage but at the same time emphasised the monopolistic situation surrounding reduced transaction costs which calls for greater transparency and competition amongst CCS. Therefore together with the European Parliament, the European Commission responded to the regulation of collective management in the digital era and also focused on the need for transparency and competition as factors, which would enhance and improve the existing system. As such, one of the final points raised in chapter five was a consideration of competing collectives as a possible alternative to the present monopolistic nature of collecting societies. The chapter argued against this alternative, with reference to the line of reasoning presented by three American economists, Besen, Kirby and Salop. On this point, the chapter concluded that although competing collectives may give rise to competition amongst collectives and therefore, a wider choice for the user, it can also lead to further problems such as vertical restraints ('business marriage') or collusion ('nod and the wink' method). A further example from a system, which employs competing collectives, will be useful to elaborate this point. Although the example is drawn from the music industry, it assists to portray the drawbacks of competing collectives.

A significant drawback of having competing collectives in the same area was seen in Trinidad & Tobago (hereinafter T&T). The Copyright Organisation of Trinidad & Tobago (COTT)¹⁶ was set up in 1984 as a private company limited by guarantee in anticipation of the *Copyright Act 1985*. COTT represents songwriters, lyricists, and music publishers in Trinidad & Tobago and manages and licences collectively for music creators and publishers the performing and reproduction rights in their copyright music under the *Copyright Act 1997*. In 2000, a competing collective to COTT was set up by Vijay Ramalal to represent the rights of chutney and rock artists, called Trinidad and Tobago Copyright Organisation (TTCO). Since the creation of TTCO, the members of COTT have derided this rival organisation saying its presence is destroying the artistic fabric of the country. COTT,

¹⁶ For more on COTT, see, <http://www.cott.org.tt/org/> (last accessed 20 July 2006)

together with the assistance of the Caribbean Copyright Link (CCL)¹⁷ met together to discuss the feasibility of having two copyright bodies in T&T. At this meeting, David Uwemedimo, coordinator for CISAC said 'our experience is that the existence of two societies in one territory has a counter-productive effect on the generation of royalties for the creative community'¹⁸. He went on to elaborate his point by saying that when two organisations co-exist users tend to claim they don't know whom to pay and artists ultimately suffer.

However, the most significant drawback in relation to competing collectives came about when in April 2005, an initiative on the part of the TTCO was put in to practice by selling licences to pirates 'that will allow [music pirates] to sell copyrighted music'¹⁹. TTCO stated – 'We would charge pirates according to their projected monthly income'. This would mean that the pirates will pay 5% of that figure to TTCO and the funds will then be distributed among the artists.

Ultimately, as in T&T, the situation that is reflected through a second collective is neither the reduction of transaction costs nor a generation of competition between the right holder and the collecting society or competition between the user and the collecting society. Instead, the present example illustrates that competing collectives is cost-ineffective and detrimental to creative artists. Furthermore, sending out a message such as 'if you cant stop them, then join them' goes against the entire grain of the creation of copyright collecting societies. Based on the given facts, it can then be established that competing collectives are not always the answer for the creation of competition between collectives.

Having established that the way forward is to have a single collecting society, it is timely to reflect on chapter six and the case study carried out in relation to the CLA. In carrying out the case study, chapter six considered the position of the licensees, i.e. HEIs in their

¹⁷ In 1999, following a Regional Committee on Collective Management of Copyright and Related Rights for the Caribbean, T&T was selected as the site for the Regional Centre. The Regional Centre was named the Caribbean Copyright Link (CCL) and it was also decided that the Centre would be housed at the offices of COTT.

See, *Media Release: Trinidad and Tobago Selected as Site for Caribbean Regional Centre for Collective Management of Copyright* at <http://cott.org.tt/news/media/2000/collect/html> (last accessed 20 July 2006).

¹⁸ Brasnell A., COTT slams rival body at <http://launch.groups.yahoo.com/group/caribbeanbrassconnection/message/2804> (14 June 2003) (last accessed 8 August 2006).

¹⁹ Ravello C., Giving licence to the crime of piracy, *The Trinidad Guardian* (21 April 2005) at <http://www.guardian.co.tt/archives/2005-04-23/bussguardian11.html> (last accessed 8 August 2006).

interaction with CLA and attempted to answer the question whether academic authors are fairly remunerated through the existing system of CLA.

In relation to the first issue, chapter six clearly concluded that collecting societies by their nature are monopolies and that CLA bears no exception to this rule. The dominant position of collecting societies such as CLA was reflected through the development of the interaction between HEIs and CLA and the blanket licensing system which arose from it. However, the case of *UUK v. CLA* provided the clear example of the monopolistic nature enjoyed by collecting societies such as CLA. CLA's request for a licence fee amounting to £10.25 during the proceedings of the case, which also took into account the course pack system administered through CLARCS, seriously questions their interest in HEIs. Part I of chapter six concluded on the premise that collecting societies such as CLA operate a 'take-it-or-leave-it' system under the blanket licensing system. Whilst this system may appear rigid, it does have its benefits. For example, under a blanket licensing system CCS are able to produce an intermediate level of contract detail, which reflects the need for efficiency in carrying out a high volume of IPR transactions, thereby for example, creating an 'expert tailoring' system as opposed the 'one-size-fits-all' compulsory licensing system.

In relation to the collection of licence fees and distribution of licence income, Part II of chapter six carried out a case study into selected Annual Reviews of CLA. This part of the chapter especially focused on the manner in which licence income is distributed to authors, particularly academic authors and questioned whether CLA does this in an effective manner. With reference to face-to-face interviews carried out in CLA offices, e-mail discussions and telephone conversations with members of the CLA, the chapter drew attention to a number of gaps in the distribution mechanism. For example what happens to the licence fee which comes into CLA? Why is it that CLA does not break down the figures in their Annual Reviews to illustrate how much of the licence fee goes to ALCS, PLS and DACS for distribution to authors, publishers and artists? The only information available in the Annual Reviews, in this regard, is that *x* amount is set aside for what is known as 'subvention income': the operating costs of CLA. Yet again, the fact that the interest generated on undistributed fee is used to cover the operating deficit of CLA, almost on an annual basis, calls the system into question. Furthermore, as of 2005, the interest generated on undistributed income, which in the writer's opinion, rightfully belongs to the right holder was 'bundled' into the subvention income and not shown as a separate figure.

Part II of chapter six went on to illustrate the survey system of CLA. It was also established that the distribution of licence income is based purely on the survey system. This part of the chapter focused mainly on the record keeping survey, which is employed by CLA to survey HEIs. However, once again the chapter pointed out the drawbacks of the survey system carried out randomly on universities on a three-year cycle. Therefore, whilst certain universities, such as Universities of Manchester, York, Derby and Nottingham have been surveyed twice in the last five years, some other universities such as Durham, Oxford and Aberdeen have not been surveyed even once since 1999. If the distribution of licence fee is based purely on the survey system of CLA, it needs to be addressed for a fairer and better system, as the present system appears to be incapable of remunerating authors fairly for the above reasons flagged up.

Finally, Part III of chapter six considered and analysed the licences which exist between HEIs and CLA. Commencing with the Higher Education Copying Accord of 2001, the chapter then turned to the Trial Licence for Photocopying and Scanning of 2005. The chapter focused on a number of specific clauses of this licence, particularly to draw attention to their inflexible nature. Yet at the same time, the chapter recognised the importance of the concept of collecting societies such as CLA, which provides convenience and ease of access to copyright works, both in paper and digital format, in exchange for £4.92. Whether this is a price that is worthwhile for HEIs, only time will tell.

Chapter seven, whilst recognising the strength of the concept of collecting societies – i.e. the advantage in transacting collectively and thereby reducing transaction costs also pointed out further weaknesses in the present system. In a repetition of history, the power was seen to vest with the publisher members of CCS more so than with the authors. The ‘university boom’ during the 1960s saw a number of publishers make a transition to the HE and academic sector and hence to the publication of scholarly monographs. However, the chapter revealed the manner in which the scholarly monograph market went through a change during the 1980s and set out the reasons for it, amongst which, the increased expenditure on periodicals in UK universities was seen as a major factor. Journal publication had led to the publisher being paid at least four times from public funds, which in turn questioned its justification? As chapter seven identified, the payment from public funds included –

- (1) funding the project;
- (2) funding libraries to purchase publications;

- (3) pay salaries of academics who carry out peer review, which is the process of ensuring that publications are up to the appropriate standard, prior to publication for no extra payment; and

in the writer's present opinion a further fourth factor –

- (4) Licence fees collected from institutions such as HEIs, in to which the public money has already flowed, to remunerate mainly publishers once again for the reproduction of copyright works within these institutions.

With regard to this issue the chapter concluded that although, all academic authors may not be interested in economic remuneration for their academic works, the fact that an agency such as CLA exists to remunerate them and which uses public money to fund the work of academic authors up to four times, and yet leaves the academic author empty-handed, calls for a review of the existing system.

Chapter seven proposed the authors-pays or open-access model as a solution for academic authors. In this manner, the academic author ensures that his or her work is available for non-commercial use i.e. for the purposes of private study and research. The open-access system also provides for a direct relationship between the author and the reader, hence, cutting out the middle-man. With reference to the study carried out by Hoorn E. & Van der Graaf M., titled 'Towards Good Practices of Copyright in Open-Access Journals' the chapter illustrated the types of licences available to academic authors who wish to take advantage of this system. Furthermore and as already pointed out in chapter seven, it is encouraging to note that a number of subscription model journals have made the transition to open-access and that large commercial publishers Springer and Blackwell have started programmes whereby authors get the choice to have their articles published under the open-access system. This part of the chapter also drew a few concerns arising from open-access publishing such as the issues of peer-review, free riders and author free.

Whilst the open-access initiative meets the issue of academic publishing, a solution for HEIs wanting to use copyright works in their institutions for teaching and research, and authors who wish to be remunerated for their academic contributions was modelled on the existing HERON Project. With a resource bank of 2.5 million digitised materials for rapid re-use (subject to copyright permissions), HERON is created by academics for academics and serves the interests of the HE sector. It was established that HERON differs from CLA in a

number of ways. For example, the digitised materials provided by HERON can be used very flexibly and for no additional cost the material can be viewed on screen, downloaded to disc or printed out by students who have the privilege of returning to the material as often as they need to, because HERON is not a pay-per view service. Most importantly, therefore, once the material is licensed to the institution, it may be used by students as frequently as they wish, as long as it is within the period for which the institution has been given a licence to use the material. The PackTracker system is a further advantage of HERON. However, a serious drawback of HERON is that it has digital material, but does not provide a reprography service. Therefore HEIs are still obliged to rely on CLA for clearance and copy licences for reprography services, which in the long-run can prove more costly.

Whilst the writer recognises the strengths and weaknesses of the open-access publishing and the HERON systems, it is submitted that merging the two concepts along with the RAE system can assist in the future development of this working model. According to this system academic authors can look to the HERON-based model for funding, to carry out their academic research whilst at the same time providing HEIs wanting to use copyright works for teaching and research a negotiable licence system. Therefore, as well as acting as a clearinghouse, it is suggested that HERON will also act as the body to which authors can apply for publication costs. Contrary to the existing system where public funds are used three to four times, according to the working model they will be used once. Furthermore as a result of the open-access initiative, libraries will have to pay less for subscription-based journals if more emphasis is placed on electronic journals. Although a licence fee will have to be paid to HERON for access to digital texts and as such to remunerate the publishers, HEIs would benefit from HERON's flexible system, as emphasis is placed on the academic community and academic authors as opposed to publishers. Whether the model will work effectively and smoothly can of course only be confirmed when put into practice and with time.

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